

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-1085-
1094

To be argued by
DANIEL J. BELLER

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 77-1085-1094

UNITED STATES OF AMERICA

Appellant

FRANK MOLES, ANGEL RODRIGUEZ, WILLIAM HIGH
TOWER, SIDNEY FOSTER, JOSEPH CAMPBELL, LOIS
SAMPSON, YVONNE ALVAREZ, SCHENCKELT, DON
WILSON, JAMES LAWS, TOMMY DAVIS, JOHN MORRIS,
LAWRENCE E. MITCHELL, RADIANCE BONILLA, AND
CHARLES COWPER

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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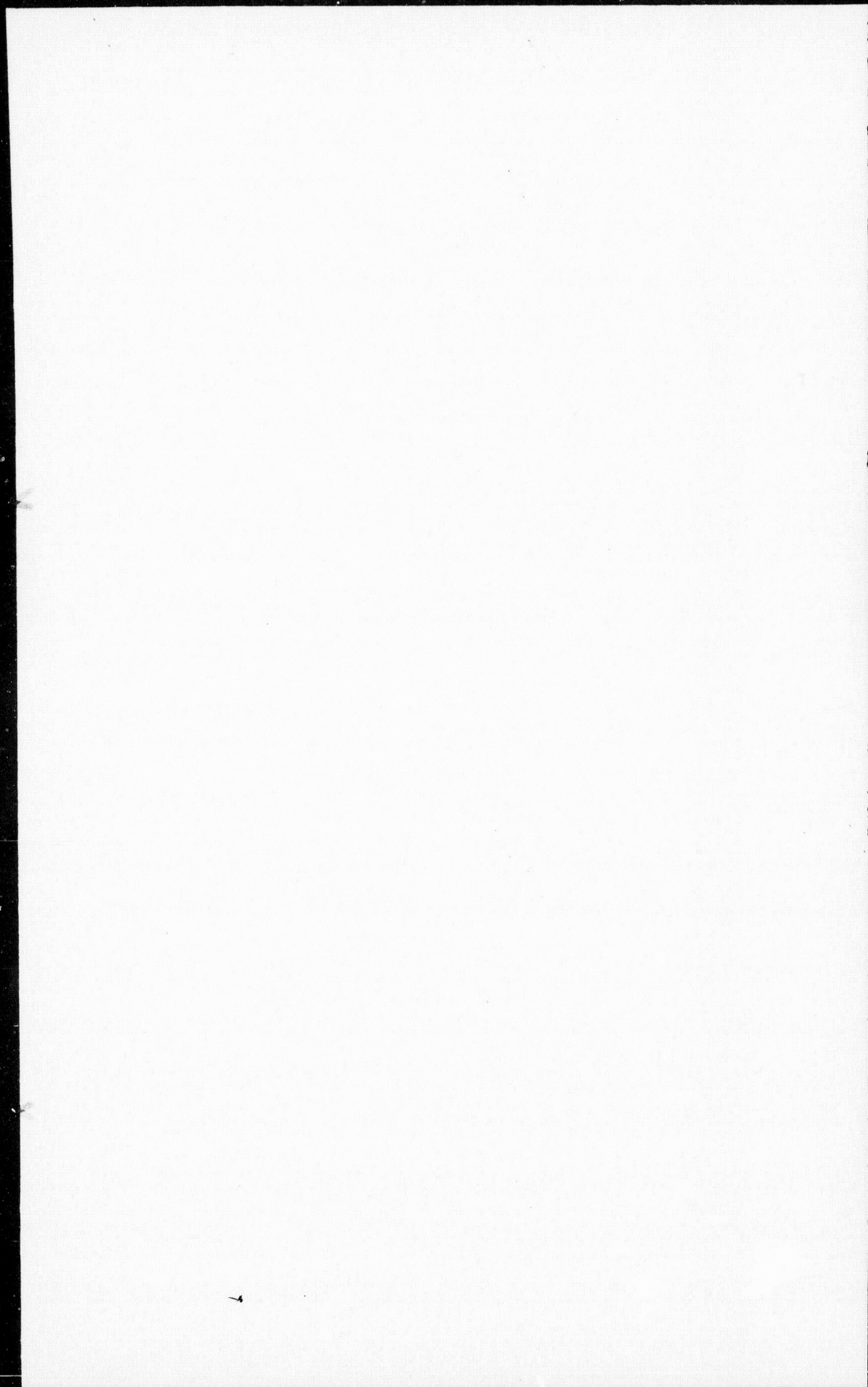
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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 77-1085-1094

UNITED STATES OF AMERICA,

Appellee,

—v.—

FRANK MOTEN, ANGEL RODRIGUEZ, WILLIAM HIGHTOWER,
SIDNEY FOSTER, JOSEPH SAMPSON, LOIS SAMPSON,
YVONNE ALVAREZ SCHENNAULT, DON WILSON, JAMES
LAWS, TOMMY DAVIS, JOHN MORRIS, LAWRENCE
MITCHELL, RAPHAEL BONILLA and CHARLES COWPERS,
Defendants-Appellants.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

This is an appeal by fourteen defendants * from judgments of conviction entered on January 13, 21 and 31, 1977 in the United States District Court for the Southern District of New York after a fourteen-week trial before

* Thirteen defendants have perfected their appeals. By letter of Frank A. Lopez, Esq., dated April 11, 1977, this Court was advised that Angelo Rodriguez died in Atlanta penitentiary during the pendency of this appeal and no brief has been filed in his behalf. By order of this Court dated May 12, 1977, defendant Sebastian Intersimone was severed from this appeal.

the Honorable Richard Owen, United States District Judge, and a jury.

Indictment 76 Cr. 324, filed on April 5, 1976,* charged the fourteen appellants and nineteen other defendants in forty counts with various violations of the federal narcotics laws. Count One charged all thirty-three defendants with a conspiracy to violate the narcotics laws from January 1, 1968 until the filing of the indictment in violation of Title 21, United States Code, Sections 173, 174 and 846. Counts Two and Three charged Juan Antonio Alvarez and Frank Moten, respectively, with engaging in a continuing criminal enterprise in violation of Title 21, United States Code, Section 848. Counts Four through Forty charged substantive violations of the narcotics laws against thirty defendants.

Trial commenced on August 10, 1976 as to twenty-two ** defendants *** on a redacted thirty-count indict-

* The indictment was sealed on April 5, 1976, and unsealed on April 21, 1976, after the arrest of all but two of the previously unjailed defendants.

** Four defendants, John Capra, Leoluca Guzzino, Steven Dellacava, and Helen Kellem were severed prior to trial. A fifth defendant, Solon Glaze, was severed during jury selection due to illness in his attorney's family. Three defendants, Luis Sureda, Michael Parker and Ann Reynolds pleaded guilty and testified for the Government at trial. Two defendants, Eduardo and Lazaro Yaujar, convinced the Government prior to trial that they had no knowledge that their activities were drug related, and the Government filed *nolle prosequis* with respect to both defendants. One defendant, Al Williams, a/k/a "Big Al from Chicago," has never been apprehended and is presently a fugitive.

*** A principal defendant, Juan Antonio Alvarez, was tried *in absentia* under the authority of *United States v. Tortora*, 464 F.2d 1202 (2d Cir.), *cert. denied*, 409 U.S. 1063 (1972). Alvarez, who had been released on bail of \$100,000 surety bond and \$400,000 personal recognizance bond secured by deeds to property in Florida failed to appear for trial, although he had knowledge of the trial date.

ment.* On November 12, 1976, after six and one-half days of deliberations the jury returned verdicts of guilty against the fourteen appellants and three additional defendants, Juan Antonio Alvarez, Albert Lee Jones and Sebastian Intersimone.** On January 21, 1977 Judge Owen imposed the following sentences, all of which were concurrent except as otherwise noted: ***

<i>Defendant (Total Sentence)</i>	<i>Counts</i>	<i>Term of Imprisonment</i>	
		<i>Incarceration</i>	<i>Fine</i>
1. Frank Moten **** (25 years; \$50,000)	One	15 years	concurrent
	Eight	15 years	\$25,000
	Nine	10 years	\$25,000, consecutive to Count Eight
2. Angel Rodriguez (15 years; \$50,000)	One	15 years	
	Four	15 years	\$25,000
	Five	15 years	\$25,000
	Six	15 years	
	Seven	15 years	
3. Sebastian Intersimone (15 years; \$25,000)	One	15 years	\$25,000
	Twelve	15 years	

* Six counts of the original forty-count indictment charged defendants not on trial with substantive violations of the narcotics laws and these counts were severed. Four substantive counts were dismissed at the close of the Government's case.

** The jury acquitted the defendants Donald O'Dood, Marion Dunmore, John P. Morgan and Nelson Alvarez and failed to reach a verdict with respect to the defendant Bernard Brightman.

*** All the defendants were sentenced on January 21, 1977 with the exception of Mitchell (January 13, 1977) and Intersimone (January 31, 1977).

**** The jury failed to reach a verdict against Moten on Count Three, charging him with managing a continuing criminal enterprise, and Counts Ten and Eleven in which he was charged along with Bernard Brightman with possessing with intent to distribute cocaine.

<i>Defendant (Total Sentence)</i>	<i>Counts</i>	<i>Term of Imprisonment</i>	
		<i>Incarceration</i>	<i>Fine</i>
4. William Hightower * (12 years)	One	12 years	
	Sixteen	12 years	
	Seventeen	12 years	
	Nineteen	12 years	
5. Sidney Foster ** (10 years)	One	10 years	
6. Joseph Sampson (10 years)	One	10 years	
	Twenty	10 years	
7. Lois Sampson (12 years)	One	12 years	
	Nineteen	12 years	
	Twenty	12 years	
	Twenty-One	12 years	
8. Yvonne Schennault *** (20 years; \$45,000)	One	5 years	\$20,000
	Thirteen	15 years	\$25,000
9. Don Wilson (8 years)	One	8 years	} consecutive
	Fifteen	8 years	
10. James Laws (10 years)	One	10 years	
	Twenty-Four	10 years	
11. Tommy Davis (2 years)	One	2 years	
	Twenty-Two	2 years	
	Twenty-Three	2 years	
12. John Morris **** (10 years)	One	10 years	
13. Lawrence Mitchell (12 years)	One	12 years	
	Twenty-Seven	12 years	
14. Raphael Bonilla ***** (5 years)	One	5 years	
	Twenty-Nine	5 years	
15. Charles Cowpers (12 years)	One	12 years	
	Twenty-Eight	12 years	

* The jury acquitted Hightower on Count Eighteen.

** The jury acquitted Foster on Count Eighteen.

*** The jury acquitted Schennault on Count Fourteen.

**** The jury acquitted Morris on Count Twenty-Five.

***** The jury acquitted Bonilla on Count Thirty.

All of the appellants, with the exception of Joseph Sampson, Lois Sampson, Tommy Davis and Raphael Bonilla, are presently incarcerated and serving the sentences imposed in this case.*

Statement of Facts

A. Introduction

The investigation and prosecution of this case brought to an end the operations of a massive national and international narcotics organization whose members were responsible for the distribution of hundreds of kilograms of heroin and cocaine throughout major metropolitan centers in New York, Miami, Washington, and Chicago for at least the period from 1968 to 1975. The indictment and trial here focused on the activities of narcotics violators operating on the highest-level of business organization. The evidence at trial established a direct line between importers and suppliers of narcotics to the conspiracy and wholesale traffickers who distributed heroin and cocaine in the various cities involved. Their activities revolved around a "core" of wholesale middlemen who purchased bulk quantities of heroin and cocaine from the suppliers and distributed drugs for profit to the wholesale traffickers. A conceptual organizational chart portrays the conspiratorial enterprise as follows: **

* The jury convicted Juan Antonio Alvarez on Counts One, Four, Five, Six and Seven. Alvarez was acquitted on Count Two, charging him with a continuing criminal enterprise. Alvarez continues to be a fugitive and has not been sentenced. The jury also convicted Albert Lee Jones on Count One. Jones who was sentenced to 5 years' probation, has not appealed.

** Asterisks denote defendants on trial; defendants-appellants are denoted by underlining. A copy of the chart, although not in evidence, was used by the Government in its opening state-

[Footnote continued on following page]

SUPPLIERS

HEROIN

John Capra ("Johnny Hooks")
 Leoluca Guarino
 Steven Dellacava ("Beansie")

*Sebastian Intersimone
 ("Benny, 'Mr. B'")

COCAINE

*Juan Antonio Alvarez ("Tony")
 *Angel Rodriguez ("Angelo")
 Jose Luis Sureda ("Luis")
 *Nelson Alvarez ("Tony's Brother")
 Eduardo Yaujar ("Angelo's Uncle")
 Lazaro Yaujar ("Angelo's Cousin")

MIDDLEMEN

*Frank Moten

John Brown

Michael Parker

DISTRIBUTORS

WASHINGTON, D.C.

*William Hightower
 *Sidney Foster
 ("Chinch")
 *Joseph Sampson
 ("Bootnose")
 *Lois Sampson

NEW YORK - NEW JERSEY

*Bernard Brightman
 Solon Glaze
 *John Morris
 ("Papers")
 *Lawrence Mitchell
 ("L.J.")
 Willie Womack

*Don Wilson
 *Albert Lee Jones
 ("Al from Norfolk")
 *James Laws
 ("Tobe the Robe")
 *Charles Cowpers
 ("Chi")
 *Marion Dunmore

*Tommy Davis ("Bipty")
 *John P. Morgan ("J.P.")
 *Raphael Bonilla
 ("Spanish Michael")
 ("Little Michael")
 Helen Kellem ("Pam")
 Ann Reynolds
 (Lois' Sister)

CHICAGO, ILL.

*Yvonne Alvarez
Schennault
 Al Williams
 ("Big Al from Chicago")
 *Donald O'Dood

The evidence at trial established that Juan Antonio Alvarez and Angel Rodriguez, Miami residents, were the principal suppliers of cocaine to the conspiracy, selling approximately eighty kilograms yearly between 1968 and 1974; that Sebastian Intersimone, while living in New York City and later in Accord, New York, was a supplier of heroin to the conspiracy, as were John Capra, Leoluca Guarino and Steven Dellacava; that Jack Brown aided and advised by Frank Moten and, after 1971, by Michael Parker, Brown's son-in-law, constituted the core group and focal point of the enterprise, buying heroin and cocaine in bulk and reselling to their wholesale customers.

ment and in summation and was referred to on several occasions by defense counsel as well.

The chart simply reflects paragraphs 5(a) and (b)(1)-(12) of the indictment, which outlined the structure of the conspiracy and the roles played by each of the defendants in furthering its purposes. The indictment summarizes the organization involved as follows:

"The conspiracy took the form of a loose-knit business organization with members of the conspiracy operating at three basic levels. At the first level, some of the defendants and co-conspirators served as importers and sources of supply of narcotic drugs. At the second level, other members of the conspiracy acted as middlemen, purchasing narcotic drugs in wholesale quantities directly from the suppliers. In turn, these middlemen sold heroin and cocaine in multi-kilogram quantities to defendants and co-conspirators at the third level who, in turn, distributed these drugs to their respective customers. Certain of the other defendants and co-conspirators performed specialized functions which were essential to the success of the overall conspiracy. In this fashion, a chain of distribution was established for this narcotics-trafficking business leading from sources of heroin and cocaine through middlemen, wholesalers and retailers and ultimately to narcotic addicts and users in New York City, Washington, D.C., Chicago, Illinois, Miami, Florida, and other cities in the United States."

The evidence also established that as narcotic drugs were flowing through the organized channels of distribution of this conspiracy to the streets, cash money in the millions of dollars was flowing up from the streets in small denomination bills to the core group and suppliers. The Government's proof showed the core group in possession of more than two million dollars between 1969 and 1973 and the proceeds of this venture no doubt exceeded that figure many times over.

The Government's evidence was presented through more than two hundred documentary exhibits, including telephone toll records, hotel registration slips, travel receipts, credit card purchase slips,* photographs, letters; car vehicle registrations and papers seized from the defendants; and through the testimony of more than thirty-five witnesses, including six participants in the conspiracy—Jack Brown, Michael Parker, Luis Sureda, Ann Reynolds, Marion Ladd and Estelle Tompkins—who testified concerning the range and scope of the defendants' activities.

* Almost all the documentary proof was reduced to simplified chart form, which charts were received in evidence as an aid to the jury (GX 150-158; 178-180). These charts are reproduced as part of the Government's Appendix (G. App. 1-12).

As used in this Brief, "Tr." refers to the trial transcript; "GX" to Government Exhibits at trial; "DX" to Defense Exhibits marked at trial; "App." to Appellants Joint Appendix; "S. App." to Supplemental Appendix for Appellant Sampson; "G. App." to the Government's Appendix; "Br." to Appellant's Brief; and "H. Tr." to hearing transcript.

B. The Government's Case

1. The Structure of the Conspiracy and the Roles of its Members

a. The Core Group: Jack Brown, Frank Moten and Michael Parker

(1) Jack Brown and Michael Parker

The evidence showed that Jack Brown was a bulk purchaser of cocaine and heroin before and during the period of the conspiracy, and that he distributed these narcotics to customers in New York, and to others who came periodically from Chicago and Washington to New York to purchase both heroin and cocaine from him.*

* Brown was born in Washington, D.C. in 1928 where he lived until 1954. By that time he had already had a series of arrests and convictions, beginning in 1944, for shoplifting and possession of narcotics. Brown testified that he had become addicted to heroin in 1946 and remained addicted until 1954 or 1955 when he served a six months sentence at Rikers Island jail after which he decided to break his habit. Thereafter Brown never again used heroin intravenously although he occasionally "snorted" heroin when depressed and frequently snorted cocaine.

Brown began selling drugs in New York in the 1950's. He lived for a time in a rooming house on 126th Street where he met some of his later associates and co-conspirators, Frank Moten, Solon Glaze and Willie Womack. In 1959 he was introduced to co-conspirator Sebastian Intersimone who began selling heroin to Brown. In 1960 Brown was arrested and convicted in Washington, D.C. for violating the federal narcotics laws. He was incarcerated in Atlanta penitentiary where he met, among other people, Leo Guarino, who, in 1970, became one of his principal heroin suppliers. Brown was released from Atlanta in 1964 and returned to New York where he committed a series of burglaries with an associate named Antonio Perdiz. By 1965, Brown was back in business selling heroin and cocaine, a trade he maintained until 1975. (Tr. 987-995, 999-1000, 1182, 1243).

At a conservative estimate, Brown purchased and resold between 45-80 kilograms of cocaine each year between 1969 and 1974, and perhaps 10-20 kilograms of heroin annually between 1970-1973. Michael Parker, who married Brown's daughter in 1969, moved to New York in early 1971 and slowly came to play an important role in this conspiracy as Brown's bodyguard, messenger-boy and later as a narcotics dealer in his own right.

Between 1968 and 1972 during the course of the conspiracy, Brown lived in and used various apartments in Manhattan where he stored his narcotics and to which his suppliers and customers came to deliver and purchase drugs.* In November, 1972, Brown, with his wife, Jan, moved to a home in Orangeburg, New York, where he lived and continued his narcotics activities until April, 1973.** At that time, after learning that he had been indicted for violations of the federal narcotics laws,*** Brown went "underground," living first in an apartment

* From 1966-1969 Brown lived at 60 Riverside Drive on 78th Street; from 1969-1972 he lived at 180 West End Avenue in an apartment complex known as Lincoln Towers. Brown also maintained a "stash" apartment from 1971-1972 at 56th Street, between Eighth and Ninth Avenues, and a room in the apartment of Carol Cuffee at 200 West 90th Street. (1045-46, 1087, 1093-94).

** While Brown lived in Orangeburg, New York, he also maintained an apartment at 135 West 96th Street where he did business while in the city. Brown also sold drugs from the apartment of his common-law wife, Jodi, at 10 West 66th Street and at 120 W. 97th Street. (Tr. 1327-28).

*** Brown was charged in indictment 73 Cr. 331, filed in the United States District Court in the Southern District of New York on April 13, 1973, with conspiring with John Capra, Leoluca Guarino and Steven Dellacava to violate the federal narcotics laws. Brown testified that he read about his indictment and about the arrest of Capra, Guarino and Dellacava in *The New York Times* on April 15, 1973. Brown went into "hiding" thereafter. (Tr. 1359-1360).

in Manhattan * and then, in May, moving to an apartment in Coney Island.** Brown remained in the New York area until November, 1973, when he moved to Miami. He lived first in the home of his cocaine supplier, Juan Antonio Alvarez, and then in various apartments until November, 1974. (Tr. 1372-75). While in Miami, Brown continued to receive cocaine from his suppliers, and to sell drugs to certain customers, notably Yvonne Schennault, Don Wilson and, on one occasion, Charles Cowpers. In this connection, Michael Parker ***

* This apartment, located at 139th Street and Riverside Drive, was made available to Brown by his longtime customer and friend, appellant Raphael Bonilla. (Tr. 1360).

** This apartment, located at 2828 Twenty-Eighth Street, belonged to Raphael Bonilla's girl friend, Gwen. (Tr. 1360).

*** Parker, who was 26 years old at the time of trial, testified that he was born in North Carolina and moved with his family to Maryland in 1967. He met Jaqueline Brown, Jack Brown's daughter, in high school and married her in 1969. Parker, who did not know the nature of his father-in-law's business until early 1971, was introduced to Frank Moten and William Hightower at his wedding by Jack Brown. In 1970, at the time of his daughter's Christening in Maryland, Brown introduced Parker to Joseph and Lois Sampson and Sidney Foster in the apartment of William Hightower. (Tr. 3268-3279). In August, 1970, Brown asked Parker to pick up a brown paper bag with money from Joseph Sampson and bring it to New York which Parker did. (Tr. 3280-3282). In October, 1970, Brown invited Parker to join him in Atlanta, Georgia, for a heavyweight boxing match between Muhammed Ali and Jerry Quarry and attendant celebrations. Parker flew to Atlanta with Joseph and Lois Sampson and, while there, met Brown's other guests, who included cocaine suppliers Tony Alvarez and Angel Rodriguez, Frank Moten, Tommy Davis and other of Brown's associates. (Tr. 3282-3285). After Parker moved to New York in February, 1971, he gradually became assimilated into the affairs of the conspiracy. Through conversation and personal dealings, he learned the identities of Brown's suppliers—Alvarez, Rodriguez, Capra, Guarino, Dellacava and Intersimone—and his customers. He testified that he delivered narcotics to, or observed drug transactions by, almost all of the defendants on trial. (Tr. 3292-3297).

made frequent deliveries of cocaine in 1974 to two of Brown's Washington customers, William Hightower and Sidney Foster. In December, 1974, Brown left Florida and spent several months travelling between Washington and New York, trying to avoid arrest by the Government and harm from his narcotics associates. On April 6, 1975, no longer able confidently to elude federal authorities and fearful that his life was in danger, Brown surrendered to the Government and agreed to cooperate in exchange for protection. (Tr. 1415, 1425; GX 122).

(2) Frank Moten *

Throughout the period of the conspiracy, Frank Moten was the principal advisor to and partner of Brown in his activities. Brown first met Moten in 1954 in New York and they became associated in business in the late 1950's when Moten used Brown's drug profits for his own ventures. (Tr. 1243-47). In 1965, after Brown was released from Atlanta penitentiary and returned to New York, Moten again took Brown under his wing.** He

* Moten's role in the conspiracy was accurately described in the indictment as follows:

"Defendant Frank Moten, a/k/a "Uncle," was an advisor to John Brown, a/k/a "Jack," delivered narcotic drugs to Brown and received drugs from him, introduced certain defendants and co-conspirators to Brown for the purpose of purchasing drugs, vouched for them as reliable persons, financed the narcotic operations of several of the defendants and co-conspirators, engaged in financial dealings for Brown and other of the defendants and co-conspirators, and shared in the profits of the conspiracy."

** At the time they met in 1954, both Brown and Moten were living in a rooming house. Upon Brown's return to New York in 1964 Moten was living at 135th Street and Lenox Avenue. Shortly, thereafter, Moten moved to a luxurious home in Englewood, New Jersey. (Tr. 1247-48).

encouraged Brown to set himself up in a legitimate business as a "front," as Moten had done with his own laundromat on Seventh Avenue and 123rd Street. Brown agreed and the two became partners for a short period in the Harlem Print Shop. (Tr. 1248-1251).

Moten's financial dealings with Brown were not limited to advice. Beginning in 1966 and continuing through the end of 1972 or the middle of 1973, Moten exchanged money on a large scale for Brown, using the facilities of Chase Manhattan Bank, to exchange the small denomination bills—ones, fives, tens and twenties—in which Brown was paid by his drug customers, for large denomination bills—fifties and hundreds—which Brown used, among other things, for payment to his bulk suppliers. (Tr. 1251-1255).^{*} Indeed, after 1969, Moten's financial interest in Brown's narcotics activities became even more lively.^{**} During one of their frequent cocaine snorting sessions, Brown told Moten he was making more money than ever before as a result of his newly acquired cocaine

^{*} Edward Arroyo, who was the head teller at a Chase Manhattan branch located at 135th Street and Fifth Avenue testified that as head teller he was in charge of "large" bills and that during his tenure at the bank, from 1969 to 1971, he exchanged small bills for large ones for only one customer, Frank Moten. Moten came to the bank twice weekly with brown paper bags filled with money. Arroyo testified that Moten exchanged approximately \$8,000 each week. (Tr. 6057-6061). Hannah Forrest, who succeeded Arroyo as head teller at Chase Manhattan, testified that she exchanged small bills for large for Moten between 1971-1974 on the average of \$10,000 each week, and that on one occasion she exchanged as much as \$50,000 for Moten. (Tr. 6033-6035). She also testified that she saw Frank Moten socially at various apartments he used in New York City; that she and Moten used cocaine together; that she knew Jack Brown and had seen him socially; and that Moten got his cocaine from Jack Brown. (Tr. 6004-6111).

^{**} Brown testified that he told Moten all about his drug activities, including the identities of his sources and customers. (Tr. 1191-1192, 1255-56).

connection, and that he kept much of the money at his home. Moten told Brown that he was foolish to keep his money where he was "dirty," that is, where he kept his drugs.* Moten suggested that he personally take custody of Brown's money, that he would use it for his own purposes interest-free, and that he would, if given sufficient notice, make available to Brown the large sums he needed to pay his bulk suppliers at the time of their drug deliveries.** Brown adopted Moten's proposal and thereafter gave Moten approximately \$60,000 in small bills each month for safekeeping and received money from Moten, in large bills, when a payment was due. (Tr. 1256-59).***

Moten was directly involved in the drug activities of the conspiracy in other ways as well. Throughout the period of the conspiracy, indeed as early as 1965, Moten obtained from Brown approximately one ounce of cocaine each week. (Tr. 1260). In 1967 Moten introduced Brown to William Davis ("Bubba from Boston") and asked Brown to sell cocaine to Davis. Brown agreed, on condition that Moten guarantee the sale, which Moten consented to do. Thereafter, through mid-1973, Brown sold one or two ounces of cocaine each month to Bubba Davis

* Brown had a hidden "trap" in his apartment at 180 West End Avenue where he kept both drugs and money. (Tr. 1257).

** Moten was introduced to Rodriguez and Alvarez, whom Moten knew to be Brown's cocaine suppliers, in Atlanta in October 1970 during the Ali-Quarry fight. (Tr. 1255-56).

*** Brown advised Intersimone, Hightower, Joseph Sampson and Parker of this arrangement with Moten. (Tr. 1260). Moten had a similar financial relationship with co-conspirator Willie Womack, an associate of Brown's and Moten's from the 1950's and a customer of Brown's from 1970 until the time of Womack's death in June, 1972. According to Brown, Moten was holding \$100,000 of Womack's money at the time Womack was murdered. (Tr. 1272-74).

on his trips to New York, and gave an additional one or two ounces to Moten for Davis at the same rate. (Tr. 1260-63). Moten also introduced Brown to co-defendant Bernard Brightman, a neighbor of Moten's in Englewood, New Jersey.* In 1972, when Brown expressed interest in purchasing a house outside of New York City, Moten advised Brown to have the house put in the name of Brightman, a businessman, who unlike Brown would not be inviting problems with the Internal Revenue Service by showing ownership of the house. Brown agreed to this scheme and placed the ownership of his home, in Orangeburg, N.Y., in Brightman's name. (Tr. 1323-27; GX 4D-1, D-2). In September, 1972, Moten asked Brown to sell cocaine to Brightman with Moten's promise to "stand for the package." Brown delivered one-eighth kilogram of cocaine to Brightman at Moten's house (Tr. 1315-16), and continued to sell cocaine to him—as much as two kilograms on one occasion—through September, 1974. Payment for all of these transactions was guaranteed "one hundred percent" by Moten. (Tr. 1384).**

* Brown met Brightman in 1966 and, through 1973, snorted cocaine with him and Moten on several occasions in Moten's home. (Tr. 1297-1300, 1314-16).

** In January, 1973, Brown sold Brightman one-half kilogram of cocaine. This was shortly after Brightman met Angelo Rodriguez and Tony Alvarez in Brown's Orangeburg home and learned that they were his cocaine suppliers. (Tr. 1337-1341). In April, 1973, while a fugitive hiding out at his apartment at 96th Street, Brown met with Moten and Brightman. Moten paid Brown for the package he had given Brightman in January, and Brown gave Brightman another one-half kilogram of cocaine. Moten paid for this package sometime later during one of his visits to Brown at his Coney Island apartment. (Tr. 1361-64). In February, 1974, Moten and Brightman travelled to Miami to see Brown. Brown, in Moten's presence, delivered to Brightman, at Brightman's mother's apartment in Miami Beach, two kilograms of cocaine. (Tr. 1382-84; G. App. 2). Brown saw Brightman one more time in September, 1974, in Miami when Brightman asked to be introduced directly to Brown's suppliers and Brown refused. (Tr. 1412-14).

Moten also financed the narcotics purchases of co-defendants Solon Glaze and John Morris, who were partner-customers of Jack Brown.* And finally, in September and October 1972, when Brown was short of supplies of drugs, Moten obtained for him a kilogram of cocaine on two separate occasions. (Tr. 1317-1320).**

In sum, Moten played the key role in this conspiracy providing essential services for the core group and for many of the co-conspirators *** while at the same time

* Marion Ladd testified that she lived with both John Morris and Solon Glaze in the 1950's and again was involved with both men in the 1970's and that she had met Moten in the 1950's. Glaze told Ladd on several occasions that Moten was backing his and Morris's drug purchases, and that Moten came to their apartment four to five times each week to deliver money. On one occasion in 1971 Ladd heard Glaze call Moten, after learning that his shipment of drugs was ready, and say "my shirts are in; I need bread." Ladd and Glaze then drove to an apartment Moten kept in New York where Glaze obtained \$25,000 in hundreds from Moten for the purchase of heroin. Ladd testified that on other occasions she went with Glaze to pick up money from Moten at his laundromat; with Morris to pick up \$30,000 from the laundromat; and with Glaze and Morris to pick up the money for drugs from Moten at his home in New Jersey. (Tr. 4701-04, 4712-4724). A further account of this testimony appears, *infra*, at page 44, fn. 1.

** Brown testified that Moten obtained the cocaine on both occasions from Jimmy Richardson, a mutual friend, who had obtained it from Chili Marquez, the brother of "Spanish Raymond" Marquez, and a close friend of Moten's. (Tr. 1318). This was the same Jimmy Richardson who had introduced Brown to Sebastian Intersimone in 1959 as a heroin supplier. (Tr. 999-1004). Lena Gotes, who had previously been convicted of selling cocaine, testified that in the Fall of 1972 she sold one kilogram of cocaine to Chili Marquez and Jimmy Richardson on two occasions. (Tr. 5168-5193). The Government argued in summation that this was the cocaine Brown received from Frank Moten and the jury convicted Moten on counts Eight and Nine of the Indictment which related to these two deliveries.

*** For an account of Moten's financial assistance rendered to conspirators Sebastian Intersimone and L.J. Mitchell see *infra* at pages 24 and 46, fn. 1.

sharing in the tremendous monetary rewards of the enterprise at seemingly no risk to himself.

b. The Narcotic Suppliers

(1) The Miami Cocaine Connection: Juan Antonio Alvarez and Angel Rodriguez

In the summer of 1968, while vacationing in Miami, Florida, Brown paid a visit to Angel Rodriguez, an old acquaintance and cocaine supplier of Brown's who had moved to Miami in June of that year. (Tr. 1054; GX 6W).* Rodriguez arrived at Brown's hotel in the company of Juan Antonio Alvarez, a Cuban refugee, who operated a jewelry store in Miami. Rodriguez explained that Alvarez wanted to sell a kilogram of cocaine and, after more negotiations, Brown agreed to purchase the cocaine for \$17,500. (Tr. 1054-1058).

Sometime in the Fall of 1968, after Brown returned to New York, Rodriguez and Alvarez flew to New York to discuss important business with Brown. Alvarez had made an important South American connection for large amounts of cocaine and proposed that Brown agree to purchase shipments received by Alvarez and Rodriguez in Miami.** Brown consented to the ar-

* Brown first met Rodriguez in 1965 when Brown and his partner Antonio Perdiz fenced their stolen goods with Rodriguez who operated a jewelry store at 3905 Broadway. (Tr. 994-998; GX 77). Brown and Rodriguez became good friends and in 1967 their relationship expanded to the drug field. Rodriguez advised Brown sometime in 1967 that he had a kilogram of cocaine for sale and Brown purchased it. Brown purchased at least one additional kilogram of cocaine before Rodriguez moved to Miami. (Tr. 1050-1054).

** Brown testified Rodriguez told him Alvarez had made a "big connection" for drugs. (Tr. 1061). Co-defendant Luis Sureda,

[Footnote continued on following page]

rangement and took delivery of the first shipment, two suitcases containing fifteen or sixteen kilograms of cocaine, in his apartment in New York City. (Tr. 1060-1065).

Thereafter, Alvarez and Rodriguez delivered cocaine to Brown in New York three or four times each year, averaging approximately fifteen to twenty kilograms on each occasion. (Tr. 1095). Because of the volume of purchases, the initial selling price charged to Brown was \$11,500 per kilogram; by 1972 the price increased to \$14,000 per kilogram. (Tr. 1063, 1096).^{*} Typically a courier from Miami travelled to New York by train, and later airplane, with suitcases filled with cocaine supplied by Rodriguez and Alvarez who, traveling separately to New York, completed the delivery to Brown (Tr. 654-659).^{**} Brown paid some money "up

an insurance salesman living in Miami who served as a courier of cocaine-laden suitcases for Alvarez and Rodriguez, pleaded guilty to the conspiracy charge and testified for the Government. Sureda's half sister, Amada Tarin, Tony Alvarez's paramour, admitted to Sureda in 1968 that Alvarez was a cocaine dealer. Sureda then confronted Alvarez with this knowledge and Alvarez admitted to Sureda that it was true. Alvarez also told Sureda that he had "hit it big" in 1968 and no longer needed to deal drugs on a day-to-day basis. (Tr. 636-38, 643-647).

^{*} Of course, Brown's reduced cost redounded to the benefit of his customers, to whom such efficiencies could be passed on. This is simply one example of the mutual benefit deriving from the mutual interdependence of participants in a single conspiracy.

^{**} According to Brown, Sureda began making deliveries as early as March, 1969. (Tr. 1080-1082). According to Sureda, he did not begin making actual deliveries to New York until the Fall of 1971, but his brother, Lazaro Tarin, had made deliveries prior to that time. (Tr. 653, 656). Sureda also testified that the cocaine he purchased was flown in to a commercial airport in Miami from South America; that the merchandise was secreted in artifacts made by South American Indians; and that Tony Alvarez, Angel Rodriguez and Nelson Alvarez processed the cocaine and then sent it to New York. (Tr. 647-652).

front" to his Miami suppliers in New York; the balance would be picked up by Rodriguez and Alvarez on subsequent trips to New York or, beginning in 1970, by Rodriguez's uncle and cousin who lived in Jamaica, Queens (Tr. 1096-1101).*

Rodriguez and Alvarez continued to deliver cocaine to Brown through 1972 at his apartment at 180 West End Avenue.** Thereafter, the shipments continued with regularity. In the Fall of 1972 Rodriguez brought Brown approximately fifteen kilograms of cocaine to his

* Lazaro Yaujar, Rodriguez' cousin, testified that he lived in Jamaica, Queens with his father, Eduardo Yaujar, and his mother, until his parents' departure for Miami at the end of 1972. According to Yaujar, his father had picked up money from Jack Brown on a number of occasions, which money was in turn picked up by Angel Rodriguez. Yaujar testified that in 1972 and early 1973 he also picked up money from Brown at Brown's apartment and at his Orangeburg house. Yaujar would then deliver the money to his cousin, Rodriguez. According to Yaujar, Rodriguez came to New York several times each year, that on about half those occasions Tony Alvarez came with him, and that they sometimes stayed in his apartment. (Tr. 3157-3164, 3169-3180). Brown testified that he never discussed narcotics with either of the Yaujars. (Tr. 1101).

** Brown received a shipment of between fifteen and seventeen kilograms of cocaine from Alvarez and Rodriguez in March, 1969. According to Brown, the shipment was delivered by Luis Sureda to Brown's apartment at 60 Riverside Drive. (Tr. 1080-1082).

In the Fall of 1971, Brown testified, he received a shipment of fifteen or sixteen kilograms of cocaine at his 56th Street apartment, brought in two suitcases by "Luis" from Miami. (Tr. 1105-1106). Sureda testified that he delivered a suitcase of cocaine to Rodriguez and Alvarez in New York at the "end of 1971." (Tr. 656-660). Travel records in evidence showed Alvarez and Rodriguez were in New York on November 12, 1971. (GX 157; G. App. 1). This evidence and the testimony of Brown and Sureda related to Count Four of the Indictment on which both Alvarez and Rodriguez were convicted.

96th Street apartment; * in January, 1973, Alvarez and Rodriguez delivered approximately eighteen kilograms to Brown in Orangeburg; ** in the summer of 1973, Alvarez and Rodriguez brought Brown suitcases

* Brown testified that in October or November, 1972, Rodriguez was in New York and told Brown he was expecting a shipment of cocaine. A few days later he delivered the shipment, fifteen or sixteen kilograms, to Brown's apartment on 96th Street. (Tr. 1328-29). Sureda testified he made his third delivery at the end of 1972, bringing up two suitcases of cocaine which he delivered to Rodriguez and Alvarez who were staying at Rodriguez' uncle's home in Queens. (Tr. 663-666). Documentary evidence established that Alvarez and Rodriguez flew to New York together at the end of 1972. (GX 157; G. App. 1). This evidence formed the basis of Count Five of the Indictment on which both Alvarez and Rodriguez were convicted.

** Brown testified he was in his bedroom-den in his Orangeburg, N.Y., home in January, 1973, snorting cocaine with Bernard Brightman when Rodriguez and Alvarez arrived. Brown introduced Brightman to Rodriguez and Brightman left. Alvarez and Rodriguez told Brown they were expecting a shipment which arrived two days later: two suitcases with fifteen kilograms of cocaine. (Tr. 1337-1340). Michael Parker testified that he was in Maryland for the first part of January, 1973 but that he returned to New York on about January 12th. Approximately a week later, Brown became agitated because a package of cocaine had changed colors. Brown called Rodriguez who had to fly to New York the next day to explain. Rodriguez came to Brown's home with Tony Alvarez where they were confronted by Brown, in the presence of Frank Moten, Lois Sampson and possibly Joseph Sampson. (Tr. 3500-3504).

The Government argued in summation that Brown received a shipment in January, 1973, when Parker was in Maryland and that one of the packages in that shipment was bad, necessitating Alvarez' and Rodriguez' trip to New York. This scenario was confirmed by travel documents showing Alvarez and Rodriguez in New York between January 4 and January 10, 1973 (GX 157; G. App.), by a telephone toll record showing a telephone call from Brown's Orangeburg home to Rodriguez' home in Miami on January 16, 1973 (GX 178; G. App.), and by travel records showing Rodriguez and Alvarez arriving in New York the next day, on January 17, 1973. (GX 157; G. App. 1). This testimony and evidence related to Count Six of the Indictment on which Alvarez and Rodriguez were convicted.

filled with approximately fifteen kilograms of cocaine to his Coney Island apartment.* Although Brown left

* Brown testified that in the summer of 1973, Alvarez and Rodriguez were with him at his Coney Island apartment. They told Brown that "Luis" was coming by train the next day with cocaine. The following day, Brown instructed Parker to drive Rodriguez and Alvarez to Penn Station in a Volkswagen camper-bus and to bring them back again. Parker agreed, left with them, and returned later that night. Alvarez and Rodriguez had with them approximately seventeen or eighteen kilograms of cocaine. According to Brown he sold most of this cocaine, his last shipment received in New York, to Yvonne Schennault. (Tr. 1368-1371).

Parker testified that in either July or October, 1973, Rodriguez and Alvarez were at Brown's apartment in Coney Island. Brown asked Parker to drive Rodriguez and Alvarez to New York, and he did, taking them in the camper to Penn Station where they picked up a short Spanish speaking man with two suitcases, whom they drove to the airport. Alvarez and Rodriguez brought the suitcases to Brown. (Tr. 3539-3545).

Sureda testified that he made his last delivery of cocaine to New York in the summer of 1973. According to Sureda he received two suitcases, each with twenty to twenty-five pounds of cocaine, from Alvarez in Miami. He came to New York by train and was picked up at Penn Station by Alvarez, Rodriguez and a black man who drove a camper bus. Sureda testified that during the train trip, the train had been delayed because of an accident in which the train ran down a truck on the tracks killing the driver. Sureda also testified that he spoke to two women who were on the train who had been attending a legal secretaries' convention in Florida. (Tr. 677-679).

Anna Belle Webb, National Director of the National Association of Legal Secretaries, testified that the 1973 annual convention of that organization was held July 22-26 in Hollywood, Florida. (Tr. 4436-4440; GX 139). Arthur Gregson, a locomotive engineer for Seaboard Coast Line railroad, testified that he was the conductor of Amtrak's Silver Star passenger train, routed from Miami to New York on July 30, 1973, a Monday, when the train ran into a car on the tracks killing the driver. (Tr. 4442-4449). In summation, the Government argued that this was the train Sureda took to bring cocaine to Penn Station when he was picked up by Parker, Alvarez and Rodriguez, and who brought the cocaine to Brown. This testimony formed the basis of Count Seven of the Indictment of which Alvarez and Rodriguez were convicted.

New York for Miami in November or December, 1973, there was no interruption in the flow of drugs from Alvarez and Rodriguez to him. In February, 1974, Alvarez and Rodriguez delivered to him seventeen kilograms of cocaine (Tr. 1375-1378); in May he received a shipment of twenty kilograms (Tr. 1393-96); and in September he received his final shipment of approximately fifteen kilograms of cocaine. (Tr. 1405-06). It was during this period that certain of the co-conspirators traveled to Miami to see Brown and to purchase the Alvarez-Rodriguez cocaine.*

Thus, the evidence established that co-defendants Alvarez and Rodriguez operated as suppliers of high quality cocaine to the core conspirators and, through them, to the wholesales participants continuously for a period of six years.**

* These were Yvonne Schennault, Don Wilson, Charles Cowpers, Frank Moten, Bernard Brightman and Michael Parker.

** There was substantial additional corroborative documentary and testimonial evidence in that regard. For example, Alvarez's passport showed patterns of travel to Venezuela and Ecuador consistent with Brown's testimony about the delivery of the February, 1974 cocaine shipment. (GX 26). The Government also introduced tax returns (GX 24A-F, 146A-E) and property records (GX 22, 23A, B, 161, 162) to show the pattern of Alvarez's acquisition of wealth at the same time he was dealing with Brown and to establish his ownership of an import-export operation in Coral Gables. Testimony and records from Bank Leumi established that in October, 1974, at about the same time Brown testified he gave Alvarez approximately \$70,000 as payment for his September shipment, money Brown received from Yvonne Schennault, Alvarez purchased a \$100,000 certificate of deposit, which was redeemed three months later by a different person, and deposited to the account of yet a third person, acting for Alvarez in this money-washing scheme. (Tr. 3237-3254; GX

[Footnote continued on following page]

(2) The New York Heroin Connection: Sebastian Intersimone and Co-Conspirators Capra, Guarino and Dellacava.

The chain of heroin distribution that formed a central part of the activities of this conspiracy was forged as early as 1959 when Brown was introduced to Sebastian Intersimone by James Richardson.* Intersimone, who sold only pure heroin coming directly from overseas, sold to Brown first one, then two, kilograms prior to Brown's arrest in 1960. Upon Brown's return to New York in 1964, Intersimone resumed his close friendship and business dealings with him and almost immediately thereafter again sold to Brown approximately two kilograms of heroin. (Tr. 1030-33). During this period Intersimone acted as an advisor to Brown, discussing the narcotics business and the trustworthiness of various dealers with whom Brown was transacting business. (Tr. 1138-1142).** In addition, Intersimone, however cautiously, continued his own direct participation in the narcotics traffic. In 1969 he negotiated with Brown to sell him a kilogram of heroin which he delivered to Brown's New York apart-

25B-E). DEA Agents and chemists testified that on April 21, 1976, they executed search warrants at a Miami cottage owned by Tony Alvarez where Brown testified Alvarez stored cocaine in a two foot deep hole dug in the floor of the building. The agents found the trap and a piece of aluminum foil which revealed traces of cocaine. (Tr. 915-827, 935-962; GX 11B, C).

* As noted earlier, Richardson's involvement is significant since later, in October, 1972, Richardson was instrumental in obtaining two kilograms of cocaine for Frank Moten which the latter sold to Jack Brown.

** Brown testified that at various times in the 1960's he purchased large amounts of heroin from "Patty Pontiac", "Jinx" and Joe Paradise from the "Pleasant Avenue" area. Intersimone, who was aware of Brown's activity, told Brown that dealers from that area could not be trusted. (Tr. 1142).

ment only to learn that the package contained epsom salts. Intersimone promised to "make it up" to Brown and the incident did not rupture relations between the men. (Tr. 1142-44). In the Fall of 1971 Intersimone negotiated with and delivered to Brown four kilograms of pure heroin, heroin which Brown sold over a period of months to wholesale customers in New York and Washington, D.C.* Intersimone, who charged Brown \$20,000 per kilo, met Brown in the succeeding weeks at locations in upstate New York near Intersimone's house in Accord, at which time Brown paid for the delivery of heroin. These payments were completed by January, 1972. (Tr. 1144-47).**

On one occasion when Intersimone came to see Brown in New York to pick up part payment for the four kilogram shipment, Intersimone met Frank Moten in Brown's apartment. Both Moten and Intersimone expressed their mutual concern that nothing untoward ever happen to Brown. (Tr. 1263). Sometime later, Intersimone asked Brown to help him avoid problems with the Internal Revenue Service by having some of the payments he had received that Fall "legalized." Brown spoke to Moten who agreed to arrange for a fictitious loan of \$20,000 to Intersimone from one of Moten's associates in Boston, Peter Fiumara, thereby enabling Intersimone to convert

* Among the recipients of this pure heroin, which Brown mixed with heroin he had on hand from Capra, Guarino and Dellacava, were appellants William Hightower, Sidney Foster, Joseph Sampson, Lois Sampson, Tommy Davis, and acquitted co-defendant Marion Dunmore. (Tr. 1147-1149).

** Intersimone was convicted on Count Twelve of the Indictment which charged him with the sale of the four kilograms of heroin in the Fall of 1971.

illegal profits from his heroin transactions into an apparently lawful cash asset.*

Brown continued to see Intersimone throughout the period he remained in New York and spoke to him occasionally in 1974 while Brown was in Florida. In 1975, Brown returned to New York, went into hiding and recuperated from a self-inflicted gun wound suffered in Washington, D.C. In March, having recovered, Brown telephoned Intersimone ** and told him he was well again.

* Brown flew to Boston with Moten in April, 1972, and together they visited Fiumara, an associate of Moten's. Moten explained to Fiumara the purpose of their visit and Brown gave Fiumara \$20,000 in cash. Fiumara gave Brown a certified check payable to the order of Sebastian Intersimone. (Tr. 1265-68; GX 42).

The timing of this transaction was further corroborated by telephone toll records showing a single call from Moten to Intersimone on April 6, 1972, and a call from Brown to Intersimone on April 6, 1972. The check was dated April 12, 1972. (GX 150, 151; G. App. 3, 4).

Peter Fiumara, after invoking his Fifth Amendment privilege outside the presence of the jury and having immunity conferred on him, testified at trial and identified GX 42 as a \$20,000 check he issued to Sebastian Intersimone on April 12, 1972 upon the instructions of Frank Moten who, in the course of the transaction had mentioned the name Jimmy Richardson. (Tr. 6098-6107). On cross-examination by counsel for Moten, Fiumara stated he was President of Brunswick Finance Corporation, a company in the business of making loans. Fiumara stated that the \$20,000 check constituted a loan to Sebastian Intersimone, secured by gold coins given to Moten by Jimmy Richardson. (Tr. 6108-6111). On redirect Fiumara admitted that his loan business consisted of nothing more than a checkbook which he kept at home, that actually he was a bar owner, that he never met Intersimone, that he never saw or received the gold coins, that in the four years that had elapsed he never received any interest payment or repayment of principal and that Frank Moten's word was as good as his mother's. (Tr. 6111-6124).

** Telephone toll records recived in evidence for Louise Sanford, in whose home Brown recuperated, reflected a telephone call to Intersimone's telephone number in Accord, New York, on March 30, 1975. (GX 64, 151; G. App. 4).

Intersimone told Brown that had Brown called earlier Intersimone would have had "good news," code between the men for a supply of heroin. (Tr. 1424-25).

Brown also obtained heroin, though of lesser quality, at a steady clip from another source: John Capra, Leoluca Guarino and Steven Dellacava, partner-suppliers of Brown. Between March, 1970 and April, 1973,* these men supplied Brown with heroin in amounts varying from half-kilograms to three kilograms** once or twice each month.

c. The Wholesale Distributors

(1) The Chicago Outlet: Yvonne Schennault

The evidence established that Yvonne Schennault was a principal purchaser of narcotics from the core group and that she took over the drug operations of her husband, after his incarceration in 1969.

In December, 1968, Jack Brown was introduced by a friend to Harry Schennault, a Chicago drug dealer, in

* In February, 1970, Brown attended a championship boxing match between Joe Frazier and Jimmy Ellis at Madison Square Garden, in the company of appellant James Laws and an associate named "Red Ike." During the fight, Brown recognized another spectator as Leo Guarino, whom Brown had met in Atlanta Penitentiary in the early 1960's. Brown went over to Guarino who introduced Brown to his friends "Johnnie" (John Capra) and "Beansie" (Steven Dellacava). Brown told Guarino that he was again selling drugs and Guarino advised Brown that he could supply him with heroin. This he began to do on a regular basis beginning in March, 1970. (Tr. 1107-1116).

** In December, 1971, Yvonne Schennault purchased three kilograms of heroin from Brown, which heroin Brown obtained from "Beansie." For a fuller account of this transaction see *infra*, p. 28.

a New York City apartment.* Schennault, accompanied by his lieutenants, co-defendants Al Williams ("Big Al from Chicago"), and Donald O'Dood, asked Brown to sell him three kilograms of heroin and Brown agreed. Brown contacted one of his then sources, "Alphonse,"** and the following day Alphonse and Brown delivered the heroin to Schennault, for which they charged \$81,000. After Alphonse's departure, Schennault inquired of Brown as to the possibility of purchasing cocaine. Brown offered him good "flake" cocaine, but Schennault demurred preferring crystalline form "rock" cocaine. (Tr. 1068-1075).

Shortly after Schennault and his associates returned to Chicago, Harry Schennault was arrested, convicted and imprisoned for the sale of heroin.*** Nevertheless, Schennault's contact in New York with Brown did not prove wasted. The Schennault operation soon took up its old activities under the leadership of "Big Al from Chicago" and the successor to Harry Schennault, his wife Yvonne.

In the fall of 1971, Al Williams contacted Brown and asked if he could resume their relationship which had

* Brown testified the friend was a woman named Connie Garrett. Interestingly enough, an address book seized from the home of defendant L.J. Mitchell on September 10, 1975, showed a phone number for Connie Garrett. (GX 126).

** "Alphonse," sold heroin to Brown for approximately nine months in 1968 and 1969. (Tr. 1069-1070).

*** The fact of Harry Schennault's arrest and imprisonment was elicited by defense counsel for Schennault on cross-examination of Brown. (Tr. 2216).

Brown testified that Schennault drove to New York in a lavender 1969 Cadillac Eldorado with a white vinyl top. Purchase records from Cadillac Heritage Corp. in Illinois revealed that Yvonne Schennault purchased a 1969 Cadillac on October 10, 1968. A Cadillac color chart showed that the car purchased by the Schennaults was "Wysteria poly" or lavender with a white top. (GX 46, 47, 48).

been temporarily interrupted by Harry Schennault's arrest. Brown agreed and began selling cocaine and heroin to Williams in New York in eighth and quarter kilogram amounts, a relationship which continued through April of 1973. In December, 1971, however, having already re-established his contact with the core group supplier of narcotics, Williams advised Brown he would be coming to New York with a new customer. Brown met Williams at his apartment at 200 West 90th Street and was introduced to Yvonne Schennault who, like her husband in 1968, was accompanied by Donald D'Dood. After some preliminary conversations, Yvonne Schennault asked Brown for three kilograms of heroin. Brown agreed to the proposal and succeeded in arranging for the delivery of the heroin the following day at a cost of \$27,000 per kilogram. (Tr 1169-1180).*

* This heroin was furnished by the Capra-Guarino-Dellacava group. The details of the December, 1971 delivery of heroin to Yvonne Schennault, which formed the basis of Count Thirteen of the redacted indictment of which Schennault was convicted, give an interesting picture of what can only be called the misguided genius of these sophisticated narcotics traffickers. After talking to Schennault, Brown contacted "Beansie" (Dellacava) at his air-conditioning store on Second Avenue, between 104th and 105th Streets. Delivery was arranged, according to their usual practice, as follows: Brown was to leave the keys to Schennault's rented car, which was to be parked outside Brown's "stash" apartment on 56th Street, under the driver's seat; in the trunk of the car Brown and Schennault would place a bag with money; a runner for the Capra operation would then go to the car, take the keys, open the trunk, remove the money, substitute heroin and then replace the keys under the driver's seat. On this particular trip, Brown, Schennault and her associates waited all night, with Schennault beginning to believe that the entire transaction was a "rip off." Finally, in the morning, Brown and Schennault, had to move the car because of parking regulations. They went downstairs only to find that the keys were missing. Schennault, now convinced her money had been stolen, went to

[Footnote continued on following page]

Although Schennault spoke to Brown with some frequency in the ensuing years, she did not see him again until 1973.* In the summer of that year, while living in Coney Island as a fugitive, Brown received a shipment of seventeen or eighteen kilograms of cocaine that was delivered by Luis Sureda at Penn Station to Alvarez and Rodriguez. Thereafter, Brown telephoned Schennault and told her he would like to see her. Schennault came to New York and purchased between ten and twelve kilograms of the Alvarez-Rodriguez cocaine to take back with her to Chicago. (Tr. 1369-1371).

This pattern repeated itself while Brown was in Florida. After Brown received the February, 1974, shipment of eighteen kilograms, Schennault flew to Miami and purchased twelve or fourteen kilograms from Brown (Tr. 1379); in May, after Alvarez and Rodriguez delivered twenty kilograms of cocaine to Brown, Schennault flew to Miami and purchased fourteen kilograms (Tr. 1396-1397); in the Fall, Schennault again flew to Miami and purchased approximately fifteen kilograms of cocaine

the car-rental office to secure another set of keys, returned to 56th Street, checked the trunk and found inside six one-half kilogram packages of heroin. Later on, "Beansie" told Brown that the runner, evidently lacking either nerve or experience, had inadvertently kept the keys to the car. (Tr. 1174-1180).

* Michael Parker testified he saw Yvonne Schennault in New York on two occasions in April, 1973, once at 200 West 90th Street and once at Brown's 96th Street apartment and that on both occasions she received one-half kilogram of cocaine. (Tr. 3595-3511, 3526-3531). Brown testified, however, that he did not see Schennault between December, 1971 and July, 1973. (Tr. 1371-72). The jury acquitted Schennault on Count 14 which charged her with possession of cocaine in April, 1973.

from a twenty kilogram shipment delivered to Brown by Alvarez and Rodriguez. (Tr. 1406-1411).*

Schennault saw Brown once more in Washington, D.C. in December, 1974, where Brown was hiding from some of his associates and staying with his son-in-law, Michael Parker. On this occasion Schennault gave Brown some clothing and a half-kilogram of cocaine. (Tr. 1417).**

(2) The Washington, D.C., Wholesalers: William Hightower, Sidney Foster, Joseph Sampson and Lois Sampson

The evidence at trial established that by 1968 and 1969 the structure of the Washington outlet and the activities of its principal figures were fully developed and that heroin and cocaine, being shipped into New York and received by the core group, was then purchased and distributed at a steady clip by the defendants William Hightower, Sidney Foster, and Joseph and Lois Sampson.

* There was extensive documentary corroboration of Schennault's trips to Florida. A chart reflecting "Out-of-State Conspirators Florida Hotel and Transportation Exhibits," received in evidence, showed the pattern of Schennault's travel and its coordination with the dates of deliveries of cocaine to Brown by Alvarez and Rodriguez. Schennault, who often registered in hotels under the name "Chapman," was also in Miami on occasions in April and July, 1974 to pay Brown for cocaine. (Tr. 1396, 1397; GX 158; G. App. 2).

** Parker testified that Yvonne Schennault came to see Brown in Washington at the end of 1974. (Tr. 3584-85).

On January 7, 1976 Brown placed a telephone call to Schennault, witnessed by federal agents, which was recorded. The recording and a transcript were received in evidence at trial. (GX 9, 9A). During the conversation, Schennault sought to arrange a meeting with Brown "anywhere East, West, anywhere," and told Brown she had "something you never heard of, undreamed of. . . ."

(a) Drug Partnership of William Hightower and Sidney Foster

In October or November, 1966, William Hightower made arrangements to come to New York from Washington, D.C., to renew his relationship with Jack Brown, a childhood associate. Brown met with Hightower at Carol Cuffee's apartment at 200 West 90th Street. Hightower asked Brown to "put him in position" by selling him drugs. Brown agreed and gave Hightower one-eighth kilogram each of heroin and cocaine. Thereafter, Hightower continued to purchase heroin and cocaine from Brown on a regular basis, coming up from Washington personally to make his purchases. (Tr. 1153-56).

The relationship continued until 1969 when Hightower called Brown to tell him that Sidney Foster ("Chinch") and Hightower were now "together"—partners in the drug business.* Hightower asked Brown to allow Foster to come to New York to pick up narcotics in Hightower's place, and Brown agreed. Foster, taking the phone, made arrangements to meet Brown in New York.** Thereafter, Foster came to New York twice each month, sometimes even on a weekly basis, to buy drugs—usually eighth kilograms of heroin and cocaine—for distribution by Hightower and himself. Hightower and Foster con-

* Brown had first met both Hightower and Foster when Brown was seventeen years old in Washington. (Tr. 1152, 1157).

** Brown testified that this telephone call took place sometime in 1968. The defendant Foster, however, offered records to show that he was in a federal prison from 1963 to February 1969 serving his second federal felony narcotics term and that he could not have made the telephone call in question in 1968. To avoid placing the prejudicial prison records before the jury, the Government stipulated that Foster was not in New York or Washington in 1968 (Tr. 7137-7152, 7223-24) and argued in summation that Brown was mistaken about the date, but not the event.

tinued to purchase heroin and cocaine from Brown in this fashion through December, 1972, although beginning in 1970 Foster also purchased additional packages for himself on each of his trips. (Tr. 1156-1160).

Typically, Foster would arrive around noon at Brown's apartment, either at 180 West End Avenue or at 56th Street, having taken the early train from Washington. He paid for his shipments, and returned the same day. This pattern continued until December, 1972, when both Foster and Hightower * stopped coming to New York. (Tr. 1158-1164). Thereafter, between December, 1972, and March, 1973, Lois Sampson, who was living in New York made trips between New York and Washington to deliver heroin and cocaine to Hightower. (Tr. 1161-62). On one such occasion, in February, 1973, Lois Sampson brought Hightower three eighth kilogram packages of cocaine.**

* Brown testified that after he received the shipment of four kilograms of heroin from Intersimone in the Fall of 1971, he mixed this "pure" heroin with other stock he had on hand from the Capra supply, and distributed it to his customers, including Hightower. Brown's testimony that he gave several eighth and quarter kilograms packages to Hightower in the Fall of 1971 formed the basis of Count 16 of the redacted indictment, of which Hightower was convicted. (Tr. 1150-1152). Brown also testified that Hightower came to New York to celebrate New Year's in January, 1972, and that at that time Hightower purchased one-eighth kilogram of cocaine and two-eighths of heroin. (Tr. 1163-1164). This testimony formed the basis of Count 17 of the redacted indictment of which Hightower was convicted.

** Brown testified that in early 1973 Lois Sampson told him that Hightower wanted her to bring him some cocaine. (Tr. 1336-1337). In February, Sampson brought Hightower three one-eighth packages of cocaine. This testimony formed the basis of Count 19 in the redacted indictment of which both Hightower and Sampson were convicted.

Parker testified that in December, 1972, Hightower and
[Footnote continued on following page]

After Brown's indictment in April, 1973, and the beginning of his period of fugitivity, the burden of distributing drugs to the Washington outlet fell to Michael Parker. Parker took approximately one kilogram of cocaine in eighth packages to Hightower and Foster from Brown in April and May, 1973 but made more frequent deliveries when Brown was in Florida in 1974. (Tr. 1162-63, 1361, 3518-3522). In March, 1974, Parker visited Brown in Miami, received one-half kilogram of cocaine and distributed it to Hightower and Foster in Washington over a period of four weeks (Tr. 3554-58); in June, Parker obtained a kilogram of cocaine from Brown, which he distributed over a period of six weeks to Hightower and Foster (Tr. 3558-3562, 3566-3572); in August, 1974 Brown gave Parker two kilograms of cocaine which Parker brought back to Washington.* Parker acquired "cut" from Foster and prepared six one-half kilogram bags. Over a period of weeks Parker sold two bags to Hightower and three to Foster, sending some of the money to Brown and keeping some for himself. Parker made a final delivery of one-eighth kilogram of cocaine to Hightower in December, 1974, at Brown's direction, after Brown returned to Washington. (Tr. 3572-3584, 3585-86).

Foster met with Brown at 200 West 90th Street. At that time, they suggested that Parker begin delivering drugs to them. Parker testified that Hightower and Foster spoke separately to Brown in a back room, that when Hightower emerged he was tucking a package in his pants and that Brown later told Parker he had given drugs to both. (Tr. 3427-3433). Brown did not testify about this incident. Parker's testimony on this matter formed the basis of Count 18 in the redacted indictment of which both Hightower and Foster were acquitted.

* Parker's trips to Miami during which he stayed in hotels were corroborated by travel and lodging records received in evidence and reflected in the chart summary. (GX 158; G. App. 2).

**(b) Drug Partnership of Joseph and
Lois Sampson**

Heroin and cocaine channeled through this conspiracy found a second Washington outlet through the efforts of major distributors Joseph and Lois Sampson. In 1967, Joseph Sampson, then a partner of a Washington drug dealer named "Rabbit," began coming to New York with "Rabbit" to purchase narcotics from Jack Brown. After "Rabbit's" arrest in 1967, Sampson began purchasing heroin and cocaine from Brown on his own. On one of his trips to New York in 1968, Joseph Sampson introduced Lois Sampson, his wife, to Brown and proposed that thereafter she come to New York on some occasions to pick up their narcotics. Brown agreed, and from that time until the end of 1972, Joseph and Lois Sampson, alone or together, picked up eighth kilogram quantities of heroin and cocaine from Jack Brown in New York two or three times each month. (Tr. 1165-1169).*

Toward the end of 1972, Lois Sampson moved to New York, staying alternately with her sister, Ann Reynolds, or with Brown and his family in Orangeburg, New York,

* Brown testified that he sold Joseph and Lois Sampson a portion of the heroin he received from Intersimone in the Fall of 1971 at regular intervals in eighth kilogram packages. This testimony was the basis of Count 20 in the redacted indictment of which both defendants were convicted. (Tr. 1150).

Parker testified that he delivered money from Joseph Sampson to Brown in 1970 and that while Parker was in New York, between 1971 and 1972, he saw both Sampsons as many as twenty and thirty times at Brown's apartment and that they snorted and purchased cocaine on these occasions. (Tr. 3280-82, 3406-3410).

The length and nature of Joseph Sampson's association with Brown was corroborated by an entry in an address book (GX 44J), written in Joseph Sampson's handwriting, reading "coke," under the letter "B," with a telephone number registered to Jack Brown at his 60 Riverside Drive apartment where Brown lived between 1966 and 1969. (GX 4G).

and travelling to Washington to deliver drugs to William Hightower.* Lois Sampson continued dealing with Brown through mid-1973, including the purchase of several kilograms of cocaine from Brown which she and her sister, Ann Reynolds, sold to James Lofton.**

* Some of the evidence relating to the Sampsons represents a good example of the links and cross-links between defendants in the conspiracy. Certain exhibits found in the Sampsons' possession and received in evidence showed close association between Brown and the Sampsons, such as, telephone tolls (GX 44, GX 153; G. App 6); a burial card for Brown's son, Todd, and metal social security card in the name of "Perry DuPree," an alias used by Jack Brown while on the run in Florida (GX 44A); phone numbers for Brown (GX 44C, 44G); and cards and photos relating to Brown (GX 45E, 45G). Other documents, also in the Sampsons' possession, showed relationships between the Sampsons and other defendants: for example, GX 44D and 45F (business cards of William Hightower); GX 44E (business card of Hightower and Foster); GX 45A ("thank you" card from Jack Brown addressed to William Hightower "care of" Sampson); GX 44F (paper with name of Frank Moten); GX 45C (paper with name "Spanish Mikie," the nickname of defendant Raphael Bonilla). In addition, GX 6EE (1973 photograph of Sampson and Hightower) and GX 6FF (photograph of Sampson and "Big Al from Chicago" together), documents in the possession of Jack Brown at the time of his surrender, tended to further corroborate actual links between conspirators.

** Brown testified that in December, 1972, Lois Sampson told him in Orangeburg, New York, that she and her sister, Ann, wanted to sell some cocaine to "Jimmy." The following day both sisters gave Brown \$18,000 and received one kilogram of cocaine. Approximately three weeks later, Ann Reynolds came to Brown and received two additional kilograms of cocaine for "Jimmy." Thereafter, Lois Sampson received another one or two kilograms of cocaine for "Jimmy". (Tr. 1332-1336). A portion of this testimony formed the basis for Count 21 of the redacted indictment of which Lois Sampson was convicted.

Co-defendant Ann Reynolds pleaded guilty to her role in purchasing cocaine with her sister from Brown and testified for the Government. By her recollection, she and her sister purchased ten kilograms of cocaine from Brown which they sold to James Lofton on three occasions. (Tr. 4541-4573).

(3) The New York Outlet

The final locus of the conspiracy was the New York metropolitan area where heroin—purchased by the core group from appellant Sebastian Intersimone and from the Capra supply group—and cocaine—purchased from the Alvarez-Rodriguez group—were distributed by wholesale customers at a steady clip. The background of associations between these New York wholesale distributors and the core group and their nexus to the conspiracy may be summarized as follows:

(a) Charles Cowpers ("Chi") and James Laws ("Tobe")

Charles Cowpers first began purchasing heroin and on occasion cocaine from Jack Brown in 1966. He did so continuously until early 1970 when Cowpers "left" New York.* (Tr. 1207-10a). During this period, the evidence established that Cowpers was associated in the narcotics traffic with appellant James Laws, selling heroin and cocaine to narcotics addicts in New York City.**

* Cowpers was imprisoned on a federal narcotics charge between 1970 and February, 1973. To avoid prejudice to the defendants, Government witnesses were instructed during trial preparation never to refer to meetings in prison with defendants on trial or to arrests and incarceration of a defendant on trial. So, for example, Cowpers was referred to as having "left" New York.

** Estelle Tompkins, a narcotics addict for thirty years, who lived in Washington and New York, testified that she supported her habit by "boosting," or shoplifting, clothing from expensive stores and trading-in the clothing at one-third value in exchange for narcotics. While in New York she obtained heroin in this fashion from Cowpers to whom she was introduced in 1966 or 1967 by James Laws. Between 1968 and late 1969 she purchased approximately one ounce of heroin every three weeks for her own use for which she paid in stolen clothing shared by Cowpers and Laws. (Tr. 5789-5804).

After his return to New York in early 1973,* Cowpers immediately contacted Brown and told him he wanted to start in the business again. Brown began giving Cowpers eighth kilogram packages of cocaine at Brown's apartment at 96th Street and Amsterdam Avenue.** (Tr. 1353-56). Cowpers continued to purchase cocaine in this fashion, "moving pretty fast," through April, and in November, 1974, made a final purchase from Brown in Miami of one kilogram of cocaine. (Tr. 1414-15).

Defendant James Laws first met Jack Brown in 1956 in Harlem around the time when Brown was meeting a host of underworld figures and later narcotics associates. Although the trial evidence established that Laws was associated with Cowpers in the narcotics business in the latter part of the 1960's, it was not until after Cowpers

* Cowpers' wife, Marion Dunmore, was a heroin addict who received drugs for her personal use from Brown while her husband was "away" from New York. On one occasion she asked Brown to supply her with cocaine so that she could begin selling drugs to one of her husband's customers from Chicago. Brown gave her an eighth kilogram of cocaine. (Tr. 1210-10a). Dunmore was acquitted on the conspiracy count, the only charge before the jury with respect to her.

** Michael Parker also testified he was with Brown in April, 1973, at Jodi Brown's apartment where Brown was cutting cocaine for Cowpers. Thereafter Brown, Jodi and Parker went downstairs where they met Cowpers who went off with Brown alone to the building's laundry room. When Parker later returned to Jodi's apartment, the cocaine was not there. (Tr. 3531-34). This testimony and Brown's above formed the basis for Count 28 of the redacted indictment of which Cowpers was convicted.

Estelle Tompkins testified that in mid-1973 she gave Cowpers money for a package of cocaine which she received, but which turned out to be heroin. After Tompkins complained, Cowpers replaced the package. (Tr. 5804-5805).

left New York in early 1970 that Laws began direct dealings with Brown.*

In approximately June, 1970, Laws approached Brown on a street corner on 118th Street and Seventh Avenue and spoke to him. Laws said, "I know what you're doing, I don't want you to say yes or no. I want some coke."** Brown told Laws to come to his apartment at 180 West End Avenue which Laws did a few days later. At Brown's apartment Laws purchased one kilogram of cocaine and arranged with Brown that in the future one of Laws' "women" would make the pickup of drugs. Thereafter, until the end of 1972, Laws purchased cocaine, beginning in quarter kilogram amounts and quickly moving up to kilogram quantities, approximately once each month. (Tr. 1195-1202).***

* Estelle Tompkins testified that she knew of Laws as early as 1947 but was first introduced to him in 1960. In 1962 Laws sold an ounce of heroin to Tompkins and her paramour. In 1965, she asked Laws for heroin and he introduced her to "Shirt" from whom she purchased heroin until "Shirt" was arrested. Sometime thereafter Laws introduced Tompkins to Cowpers who became her regular supplier of heroin—heroin the Government argued came from Jack Brown. (Tr. 5788-5800).

** Laws had reason other than his association with Cowpers to know of Brown's drug activities since, as noted earlier, Laws was present with Brown in February, 1970 at Madison Square Garden when Brown renewed his acquaintanceship with Leo Guarino. (Tr. 1107-08).

*** Brown testified with some specificity as to two other particular transactions with Laws. In November, 1971, Brown recalled a discussion with a mutual friend, Bey Brown, concerning certain problems, during which Laws name was mentioned. Around that time Laws delivered money to Brown for a kilogram of cocaine thereafter picked up by one of Laws' "women." (Tr. 1204-07). This testimony formed the basis of Count 24 in the redacted indictment on which Laws was convicted. Brown also

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(b) Tommy Davis ("Bipy")

Tommy Davis, who met Jack Brown in 1944 in Washington, D.C., and who had worked in the early 1960's for Frank Moten, first asked Brown to supply him with narcotics in 1967. However, it was not until 1968 that Brown agreed to do so. Thereafter, for four years until the end of 1972, Davis purchased eighth and quarter kilogram quantities of heroin and cocaine from Brown, once or twice each month: first at Brown's apartment at 60 Riverside Drive and then at his 180 West End Avenue apartment.* (Tr. 1213-1215; 3422).

testified that in March or April, 1972, he drove to Laws' home in Queens to deliver a kilogram of cocaine to him. (Tr. 1203-04). Michael Parker testified that he saw Laws at Brown's apartment at Lincoln Towers on several occasions and that Brown told Parker he was dealing in drugs with Laws. Parker also testified that in the Fall of 1971 he drove with Brown's paramour, Jodi, to deliver a half kilogram of cocaine to Laws from Brown and that on one occasion he drove Brown to Laws' house in Queens at which time, according to Parker, Brown went to pick up money for a drug transaction. (Tr. 3393-3406).

* Brown described two particular transactions. He recalled that after a birthday party in his honor at the Waldorf Astoria in May, 1971 several friends returned to his apartment at Lincoln Towers, including Davis. That night Brown gave Davis one-eighth kilogram of heroin and cocaine. (Tr. 1220-21). Davis was charged and convicted in Count 27 of the redacted indictment with this transaction. Brown also testified that after his son Todd's last birthday party on November 23, 1971 in the hospital where Todd was suffering from pneumonia, friends, including Davis, again returned to Brown's apartment. At that time Davis purchased either an eighth or quarter kilogram of cocaine from Brown. (Tr. 1221). These events formed the basis of Count 23 on which Davis was also convicted.

Brown also recalled a conversation with Davis sometime in 1970 in which Davis told Brown he had been arrested in New Jersey with heroin he had purchased from Brown. (Tr. 1215-1220). Newark Police Sergeant Alfred Pepe testified that he arrested Davis on November 2, 1970 in Newark, New Jersey, in possession of 175 "decks," or glassine bags, of heroin. According

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(c) **Albert Lee Jones ("Al from Norfolk") and Don Wilson ("Don from South Carolina")**

Albert Jones, who was introduced to Jack Brown by Brown's sometime babysitter, full-time narcotics customer and severed defendant Helen Kellem, purchased heroin and cocaine from Brown once or twice each month from at least mid-1971 through the end of 1972. (Tr. 1234-1236).^{*} At least until the fall of 1971, Jones' silent partner in these narcotics deals was Don Wilson who accompanied Jones on his trips to Brown's apartment and who put up the money for Jones' purchases.^{**} In the Fall of 1971, Don Wilson secured an introduction to Brown near Frank Moten's laundromat at 123rd Street and Seventh Avenue. Wilson confided to Brown that he had been backing Albert Jones and asked for the right to purchase directly from Brown. Brown agreed and thereafter Wilson began purchasing cocaine from Brown on a steady basis, buying quarter, half and kilogram amounts of cocaine throughout the period that Brown lived in Manhattan. (Tr. 1238-1243).

to Pepe, the heroin, which was received in evidence, was sufficient to supply an addict with a \$40-a-day habit for thirty-five days. (Tr. 5598-5604, 5622; GX 52B, C).

^{*} Although Brown recalled commencing his dealings with Jones in 1971, accordingly to Jones' redacted confession received in evidence at trial, he actually met Brown in 1969 and began dealing with him at that time. (GX 79A).

^{**} Brown testified as to the specifics of two particular transactions with Jones: one occasion in April or May, 1971 when Jones purchased a one-eighth kilogram package of cocaine which he cut in Brown's bathroom; and a heroin transaction in 1972 in connection with which Jones advised Brown he had been arrested. (Tr. 1236-1238). DEA Agent Richard Holbrow testified to the arrest of Jones on November 11, 1971 for the sale of approximately one-half kilogram of heroin at which time Jones signed a written confession, received in evidence at trial, admitting that Brown was the source of the heroin. (Tr. 5688-5691; GX 50).

Brown's move to Orangeburg, New York, in the Fall of 1972 caused no interruption in Wilson's cocaine purchases. In October or November, 1972, Brown received a shipment of fifteen or sixteen kilograms of cocaine from Angelo Rodriguez. Brown then sold a kilogram of cocaine to Don Wilson on two occasions at 200 West 90th Street, and eight to ten kilograms in Orangeburg, New York. (Tr. 1328-1332).*

Wilson continued to purchase cocaine from Brown through 1974 in Miami,** and asked Brown to continue dealings with him even as late as the Fall of 1975.***

* This last transaction formed the basis of Count 15 of which Wilson was convicted.

** Wilson came to Miami in March, 1974 and purchased a kilogram of cocaine from Brown which came from the seventeen kilogram shipment Brown received in February from Alvarez and Rodriguez. (Tr. 1392-93). Wilson also saw Brown in Miami in May when he paid for the March purchase. (Tr. 1398-99). Travel records received in evidence, and reflected in a chart, showed Wilson to have been in Miami March 29-April 4 and May 10-11, 1974. (GX 158; G. App. 2).

Michael Parker testified that he saw Don Wilson in Miami with Brown in March, 1974. (Tr. 3554-56). Parker also testified that he saw Wilson with Brown frequently in New York in the various apartments Brown used and that on one occasion, in June, 1972, Parker delivered one or two ounces of cocaine to Wilson for Brown at 200 West 90th Street. Parker testified that in the Fall of 1971 he drove Jodi Brown, at Jack Brown's request, to the Lenox Terrace Apartments where Wilson lived and where Jodi Brown delivered drugs to Wilson. (Tr. 3386-3393). Parker also saw Wilson at Brown's Orangeburg house between ten and twenty times, at which times Brown said Wilson was coming for drugs. Parker also saw Brown put filled suitcases into Wilson's car. (Tr. 3434-3440).

*** Not knowing that Brown had surrendered to the Government, Wilson wrote three letters to Brown in July and December, 1975, in which he asked Brown to get him started again in the drug business. The letters, received in evidence, contained phrases

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(d) Raphael Bonilla ("Spanish Michael")

Raphael Bonilla was a principal distributor of heroin and cocaine, acquired from core group conspirators Jack Brown and Michael Parker, for at least a five year period from 1968 through 1973. Bonilla first met Brown in 1967 in Carol Cuffee's apartment at 200 West 90th Street where Bonilla lived and Brown occasionally visited. In 1968, Bonilla told Brown he wanted to start dealing in drugs, that he didn't have too much money and that whatever Brown gave him would be a good start to build up his trade. Brown sold Bonilla cocaine on this occasion and thereafter Bonilla continued to be a steady customer for both heroin—which he purchased in eighth and half-eighth kilogram quantities—and cocaine—which he purchased in the same amounts and, on one or two occasions, in half-kilogram amounts. (Tr.1224-1230).

Bonilla received drugs not only from Brown but from Parker as well. In December, 1972, Brown who was in Orangeburg, asked Parker to deliver more than a pound of cocaine to Bonilla, which Parker did.* (Tr.1231-32; 3481-85).

such as "You are my main man. . . . You have help [sic] me out a great deal. And I think you know where I am coming from. . . . It is a must that I get back to work fast. Perhaps you can connect me with someone that I can trust." (GX 13A). "I swear on my mother that I have never betray [sic] you. What has happen [sic] to our relationship!" (GX 13B).

* Parker testified that in December, 1972 Brown prepared eighteen one-ounce packages of cocaine for Bonilla and asked Parker to deliver them. Parker delivered first eight ounces, then ten ounces to Bonilla for Brown who charged either \$600 or \$800 for each ounce. (Tr. 3481-85). This transaction was charged in Counts 29 and 30 of the redacted indictment. The jury, apparently considering it as one transaction, convicted on Count 29 and acquitted on Count 30. Parker also testified that

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(e) **John Morris ("Papers"), Solon Glaze ("Solo")
and Lawrence Mitchell ("L. J.")**

The evidence showed that John Morris and Solon Glaze were associated in the narcotics business as early as 1955. Although their relationship was interrupted in the late 1950's and the early 1960's because both were "away" from New York at various times, by 1968 Morris and Glaze had returned to New York and were purchasing heroin and cocaine from Brown in ounce quantities on at least a weekly basis—a pattern they followed until the end of 1972. This heroin and cocaine, and other

he saw Bonilla in Orangeburg on one occasion "getting high" with Brown, and saw him six or seven times at 200 West 90th Street, on some of which occasions he picked up money from Bonilla for cocaine purchases from Brown. (Tr. 3480-3481).

Brown testified as to other specific sales with Bonilla. In the latter part of 1971 Brown was at 200 West 90th Street with Bonilla and other people. One of the other men and Bonilla had an argument and the other man made derogatory remarks about Bonilla. Brown found a rifle under a sofa, fired in the area of the back door and told the man not to continue talking about Bonilla in that fashion. On the same occasion, Bonilla purchased an eighth kilogram of cocaine from Brown. (Tr. 1229-1230). Brown also testified that he gave Parker cocaine to bring to Bonilla in 1972. (Tr. 1230-1231). Finally, in April, 1973, when news of Brown's indictment was published on the front pages of *The New York Times*, Bonilla allowed Brown to stay with him at his 139th Street and Riverside Drive apartment and then helped him move to Coney Island in early May. Bonilla celebrated Brown's birthday with him and Parker in May, 1973, in Bonilla's girl friend's apartment, and at that time Bonilla purchased two-eighth kilogram packages of cocaine. (Tr. 1227-1228, 1359-1360).

As noted earlier, a piece of paper found in the home of Joseph and Lois Sampson in April, 1976, with the name "Spanish Mikie", Bonilla's nickname, was received in evidence (GX 45C), and suggests that Bonilla's claims of non-involvement with conspirators other than Brown must be viewed with the most jaundiced eye.

large quantities of drugs were cut, mixed and packaged in cellophane bags by Glaze, Morris and their women—"Agnes," Ella Dee Pitts and Geraldine Pitts—in various apartments in New York City. The "packaged" product was then distributed by these women to narcotics addicts in the street in bunches of five dollar bags. Frank Moten financed the purchases of large amounts of these drugs by John Morris and Solon Glaze and they shared with him the profits of their sales.*

* Brown testified that he first met Morris in 1955 and that he began to sell drugs to Morris in 1968, in amounts of one or two ounces, and not more than three ounces. At first, Morris purchased drugs every two weeks; then, in 1971, as his business developed, he purchased ounces of cocaine every day. (Tr. 1185-87). Brown recalled one particular transaction which occurred in the latter part of 1971. Morris drove to Brown's apartment at 180 West End Avenue to purchase two ounces of cocaine. While there he pointed out to Brown a brand new Cadillac Eldorado with a vinyl top that Morris had just purchased. Brown gave Morris two ounces of cocaine on that occasion. (Tr. 1194-95). This transaction formed the basis of Count 25 of the redacted indictment on which Morris was acquitted by the jury.

Michael Parker testified that he saw Morris at 180 West End Avenue on two or three occasions. (Tr. 3375-77). Marion Ladd testified she met Solon Glaze in New York City, in 1955, and lived with him when he was not in jail until 1963, at which time she married, and then again she lived with Glaze between 1970 and 1972 after her husband died. Glaze also lived with two sisters, Ella Dee and Geraldine Pitts. All of Glaze's women carried drugs for him because, as he advised them, courts "were lighter on women for carrying them than they were on men." (Tr. 4644). In 1971, when Glaze and Ladd lived together at the Dorchester Towers apartments on 68th Street and Broadway, Ladd daily picked up heroin and cocaine for Glaze from Jack Brown, whose 180 West End Avenue apartment was across the street. (Tr. 4651-4652, 4657). Ladd paid for these drugs by checks, many of which were introduced in evidence. (Tr. 4658; GX 31A consisting of twenty checks). Ladd also testified she met John Morris in the late 1950's, spent time with him then and in

[Footnote continued on following page]

L. J. Mitchell, who first met Brown in 1965, was a sporadic purchaser of cocaine from him, buying ounce quantities for a period of three months in 1965. (Tr. 1341-1342). In the Fall of 1971, however, Mitchell approached Morris and Glaze, who were old acquaintances, advised them of his need for money and his wish to begin active participation in the narcotics trade. Morris and Glaze taught Mitchell how to mix cocaine and referred him to a supplier of drugs. (Tr. 4695-4701). The following year, Mitchell borrowed \$7,000 from Brown in connection with the purchase of a gas station operated by Morris and Mitchell (Tr. 1343-1346, 4700; GX 71), and from the Fall of 1972 continuing to March, 1973, Mitchell purchased more substantial amounts of cocaine from Brown. Some of this cocaine was delivered to Mitchell in his elegant two-story home in New Jersey by Michael Parker, culminating in a kilogram purchase of cocaine

the early 1960's and that he was a dealer in narcotics at that time. (Tr. 4659, 4678-4679). While Ladd lived with Glaze in 1971 she saw Morris almost daily, and continued to speak to him on the telephone several times each week through 1972. (Tr. 4680-4682). She saw Morris at Brown's apartment several times, including once when Morris said he had come to get drugs and he remained with Brown in his "back room" for approximately thirty minutes. (Tr. 4682-4683). She often went with Glaze and Morris to purchase drugs from Brown and others, and was with them when they "cut" and mixed drugs, divided the packages, and gave them to their "girls" to sell. (Tr. 4684-4692). In 1971 Morris and Glaze received \$10,000 from Ladd for the purchase of the Casbah Bar, from which they also sold drugs. (Tr. 4694-4695). Ladd also testified that Morris and Glaze initiated L.J. Mitchell in the drug business in 1971 by introducing him to a supplier of drugs and by teaching him how to cut drugs, and that Frank Moten financed the purchases of drugs by Glaze and Morris. (Tr. 4695-4701, 4712-4713). Ladd was with Glaze and Morris on different occasions when they picked up money from Moten, always in hundred dollar bills, the most notable of which were \$30,000 on one occasion with Morris, and \$25,000 on one occasion with Glaze. (Tr. 4713-4724, 4739-4741).

by Mitchell from Brown in Orangeburg in 1973.* Mitchell's involvement in narcotics with Glaze and Morris continued well into 1975.**

* This February, 1973 transaction formed the basis of Count 27 in the redacted indictment, of which Mitchell was convicted. Brown testified that Mitchell asked for a kilogram of cocaine to service his customer, "Andrew from Detroit." Mitchell picked up the cocaine from Brown's home in Orangeburg, New York. (Tr. 1346-1350).

This incident provided substantial insight into the cross-linkage between defendants. After Mitchell requested the kilogram of cocaine Brown called Moten. Brown, who knew that Mitchell owed money to Moten, told him that Mitchell would soon have money because of the upcoming deal. Later on, Moten told Brown he had gone to Mitchell's house and had been there when "Andrew from Detroit" arrived. Mitchell, however, had instructed Moten to hide in the closet so that "Andrew" would not think the drug deal was a "rip-off." Subsequently, when Brown gave Mitchell the cocaine, Brown told Mitchell to return in the evening and settle his problem with Moten. That night, at Brown's house, Moten and Mitchell argued over the money. Mitchell claimed he was not responsible for the money and that Moten should see "Papers," that is, John Morris, because it was his responsibility. Moten insisted that the responsibility was Mitchell's, and Brown suggested that Mitchell pay a portion of the debt and settle the balance later. Mitchell then gave Moten \$2500. (Tr. 1345-1350).

Michael Parker testified that he saw Mitchell at Brown's apartment at 180 West End Avenue in 1971, at Brown's home in Orangeburg, and at Mitchell's home in Teaneck, New Jersey in 1972 and 1973. On two occasions in December, 1972, Parker delivered a quarter kilogram and half kilogram of cocaine to Mitchell. (Tr. 3475-79).

** On September 10, 1975, DEA agents executed a search warrant at Mitchell's home in Teaneck, New Jersey. Mitchell refused to open the door, even after the agents identified themselves, and instead ran upstairs into his bedroom. Among documents seized at the time was a slip of paper bearing the name "Andrew" and the word "Detroit." (GX 132). The agents also seized telephone address books containing the names of various of the co-conspirators (GX 126-29); the agents also discovered a "trap," just above the baseboard in the laundry room, which

[Footnote continued on following page]

C. The Defense Case

1. Frank Moten

William Davis ("Bubba from Boston") testified that he ran a liquor store in Boston, that he knew Frank Moten for thirty years and that he met Jack Brown in 1967 through Frank Moten, and saw Brown only on two or three occasions thereafter. Davis testified that he never used cocaine or saw Frank Moten with any cocaine. Davis also testified that Brown asked Davis' advice in finding a lawyer to sue a Boston doctor who performed an operation on Brown's son, Todd. Davis also testified that he never met Michael Parker, and that Frank Moten and Peter Fiumara sold fruits and vegetables together in Boston thirty years earlier. (Tr. 6928-6950).

was used to store narcotics, and found traces of cocaine and cutting paraphernalia, such as measuring spoons, a sifter, and a playing card with cocaine traces under and around the bed in Mitchell's bedroom (GX 38A-E); they also observed white powder footprints leading to the bathroom and seized two tinfoil packages with small mounts of cocaine. (GX 38 F-H). Under the circumstances of their entry, and in view of the fact that the toilet had just been flushed as the agents arrived upstairs, it was reasonable to infer that Mitchell had just flushed cocaine down the toilet. (Tr. 4770-4798, 4805-4815, 4830-4833).

New York Police Officer Dorothy Johnson testified that she was working on undercover assignments in 1974 with Marion Ladd as an informant. Ladd had introduced Johnson to Solon Glaze and on April 17, 1974, Johnson had purchased heroin from Glaze, which was delivered by Ella Dee Pitts at the Casbah Bar. On April 19, 1974, Police Officer Johnson again went to the bar with Ladd where she met John Morris and obtained an additional amount of heroin from Glaze. (Tr. 5521-5522). As another example of the interrelationship between the co-conspirators, Officer Johnson testified that when Glaze left the bar to obtain heroin he drove a car which Morris told her was his. Police Officer Stanley Martin testified that he conducted surveillance of this April 19, 1974 transaction and noted the license plate of the car. The Government introduced a motor vehicle registration which established that the car driven by Glaze was registered to defendant John Morris at defendant L. J. Mitchell's address in Teaneck. (Tr. 5553-5555; GX 36).

On cross-examination, Davis admitted that he had previously been convicted of a crime but that a loan application he signed and submitted to the Small Business Administration in 1970 stated that he had never been convicted of a crime. (Tr. 7246-7258; GX 182).

2. Yvonne Schennault

Schennault offered in evidence Hialeah, Florida hospital records showing that she was hospitalized between February 6 and February 14, 1973. (Tr. 6996). The Government acknowledged that Schennault, whose maiden name was Alvarez, was not related to Tony or Nelson Alvarez. (Tr. 6495).

3. James Laws

Ramona Laws, the defendant's daughter, testified as to the physical layout of the Laws' home in Elmhurst, Queens. She identified photographs, received in evidence, of the Laws' home. (Tr. 6505-6515; DX PP, QQ, RR, SS, TT, UU). This testimony was designed to show that Michael Parker's description of Laws' home, which he observed on one occasion, was incorrect. On cross-examination, however, the witness agreed that a description of the house embodied in the prosecutor's questions accurately described the house. These questions were framed on the precise description of the home offered by the witness, Michael Parker. (Compare Tr. 6515-6529 with Tr. 4025-26).

4. Charles Cowpers

The Government stipulated that there was no testimony in the Grand Jury concerning Cowpers' purchase of one kilogram of cocaine from Brown in November, 1974. (Tr. 6883).

5. Sidney Foster

It was stipulated between appellant Foster and the Government that Foster was not a resident of Washington in 1968 or January, 1969, that he was not in New York or Washington during that time but that commencing February, 1969, he was a resident of Washington, D.C.

6. Tommy Davis

The Government consented to a stipulation requested by appellant Davis that he was in New Jersey state prison from February 14, 1974 to February 17, 1976. (Tr. 6996). Renell Davis, the defendant's son, testified that he and Frank Moten's daughter were schoolmates and that a telephone call placed from the Moten home to the Davis home in June, 1972 could have been from her to him. (Tr. 6880-6882).

Defendants-Appellants Hightower, Joseph Sampson, Lois Sampson, Wilson, Morris, Mitchell and Bonilla called no witnesses and presented no evidence.*

D. The Government's Rebuttal Case

In rebuttal the Government offered photographs which established that Laws' home, when photographed from certain angles, appeared in the manner as described by Michael Parker. (GX 183-86).

* Convicted defendants Juan Antonio Alvarez and Rodriguez and acquitted defendants O'Dood and Nelson Alvarez presented no defense case. Jones, who was convicted but has not appealed, offered only a stipulation. Intersimone, who was convicted, offered certain documents and a stipulation. (DX PPP, QQQ, RRR, SSS). Dunmore, who was acquitted, offered the testimony of her mother who stated that her daughter did not use drugs. Morgan, who was acquitted, called witnesses who testified that Morgan's trips to New York did not involve drugs and that Morgan told them he spoke to Jack Brown only in connection with Willie Womack's farm. Bernard Brightman testified in his own behalf and called character witnesses. The jury failed to reach a verdict as to Brightman.

ARGUMENT

POINT I

The Jury Properly Found A Single Conspiracy Among The Defendants And Their Co-Conspirators To Traffic In Narcotics And No Severance Of Individuals Or Groups Of Defendants Was Required.

1. Single Conspiracy

All appellants seek reversals of their convictions on the ground that the proof at trial showed multiple conspiracies. In view of the overwhelming evidence of a single on-going narcotics conspiracy as charged in the indictment, and the defendants' participation in that conspiracy, the claim is without merit.

The evidence at trial established the existence of a single conspiracy to import and distribute large amounts of cocaine and heroin from at least 1968 through April, 1975 when Brown surrendered to federal authorities in Washington, D.C. The structure of this conspiracy conformed to the by-now typical chain conspiracy, consisting of a vertically integrated loose-knit combination of narcotics entrepreneurs, mutually dependent on each other, and linked to a "core" group. Such conspiracies have been recognized and identified by this Court in a host of cases, *see, e.g., United States v. Bruno*, 105 F.2d 921 (2d Cir.), *rev'd on other grounds*, 308 U.S. 287 (1939); *United States v. Agueci*, 310 F.2d 817 (2d Cir. 1972), *cert. denied*, 372 U.S. 959 (1963); *United States v. Bynum*, 485 F.2d 490 (2d Cir. 1973); *United States v. Sisca*, 503 F.2d 1337 (2d Cir.), *cert. denied*, 419 U.S. 1008 (1974); *United States v. Arroyo*, 494 F.2d 1316 (2d Cir.), *cert. denied*, 419 U.S. 827 (1974); *United*

States v. Tramunti, 513 F.2d 1087 (2d Cir.), *cert. denied*, 423 U.S. 832 (1975); *United States v. Mallah*, 503 F.2d 971 (2d Cir. 1974), *cert. denied*, 420 U.S. 995 (1975).

The question for this Court, of course, is nothing more than "whether the legal standard given to the jury by the trial court in its charge was correct and whether, viewing the proof in the light most favorable to the Government, there was sufficient evidence to permit the jury to find the single conspiracy alleged." *United States v. Taylor*, Dkt. Nos. 76-1210, 1256, 1264-66, 1288, slip op. 2805, 2809 (2d Cir. April 13, 1977).

Here, no challenge is raised with respect to the trial court's charge on this issue, which concededly was correct. As a factual matter, the record contained overwhelming evidence from which the jury could find a single conspiracy. Suppliers of heroin and cocaine funnelled narcotics to a core group consisting of Jack Brown, the principal purchaser, Frank Moten, and Michael Parker; this core, in turn, distributed heroin and cocaine to a series of wholesale bulk customers who travelled to Brown's residence to pick up their merchandise. This was not a case in which the Government attempted to link either suppliers or wholesale purchasers to the conspiracy through third- and fourth-party transactions, *see, e.g., United States v. Miley*, 513 F.2d 1191, 1206 (2d Cir. 1975); *United States v. Lam Lek Chong*, 544 F.2d 58 (2d Cir. 1976); instead, each of the defendants here dealt in large amounts of narcotics directly with the "core group" for a substantial period of years, *see, e.g., United States v. Taylor, supra*, slip op. at 2808, 2810; *United States v. Tramunti, supra*, 513 F.2d at 1105-08; *United States v. Magnano*, 543 F.2d 431, 435 (2d Cir. 1976); *United States v. Ortega Alvarez*, 506 F.2d 455, 457 (2d Cir. 1974), *cert. denied*, 421 U.S. 910 (1975). The evidence established that each of the appellants and their co-conspirators knew that the core conspirators were involved

in massive sales of narcotic drugs. Accordingly, each of the complaining defendants knew, or reasonably should have known, that he or she was a member of a large and continuing illicit scheme.

Thus, this case is squarely controlled by *United States v. Bynum, supra*, a case whose facts closely parallel the evidence at this trial. Bynum there, as Brown here, was at the core of a conspiracy, serving as a bulk purchaser of heroin and cocaine from different suppliers and as a seller of heroin and cocaine to an organization of customers, thereby creating a three-level structure of suppliers, middlemen and wholesalers. This Court concluded in *Bynum*:

"Thus the conspirators, at one end of the chain knew that the unlawful business would not, and could not, stop with their buyers; and those at the other end knew that it had not begun with their sellers. That being true, a jury might have found that all the accused were embarked upon a venture, in all parts of which each was a participant, and an abettor in the sense that the success of that part with which he was immediately concerned was dependent upon the success of the whole.' [citation omitted.] The fact that not all of the defendants may have known and worked directly with all of the others is not significant since it is clearly established that each knew from the scope of the operation that others were involved in the performance of functions vital to the success of the business."

United States v. Bynum, supra, 485 F.2d at 496;* see also, *United States v. Tramaglino*, 197 F.2d 928, 930 (2d

* It is of special significance that in *Bynum*, as here, the charges involved proof of separate suppliers of heroin and cocaine.

Cir.), *cert. denied*, 344 U.S. 864 (1952); *United States v. Tramunti*, *supra*, 513 F.2d at 1105-1108.

The defendants in this case were not low-level street addicts who made occasional purchases of small quantities of drugs for their own use; nor can it be said of any of the appellants that their "dealings were on one occasion only, with a lesser figure, for a small amount." *United States v. Tramunti*, *supra*, 513 F.2d at 1112 (evidence insufficient as to only one of fifteen appellants). Here, each of the distributor-appellants was involved in frequent transactions with the core group in cocaine and, in almost all instances, heroin as well. Nine of the twelve distributor-appellants—Schennault, Hightower, Foster, Joseph and Lois Sampson, Cowpers, Morris, Davis and Bonilla—made purchases of both heroin and cocaine; Wilson, who purchased cocaine from Brown, was also a partner of Albert Lee Jones and backed his purchases of heroin and cocaine; Laws, a cocaine customer, was Cowpers' partner in the heroin traffic as well; and Mitchell's cocaine activity merged with the heroin business of his associates Morris and Glaze. Moreover, these were long-term business relationships developed over years of activity, nurtured by mutual trust. Seven of the twelve distributor-appellants—Hightower (1966-1974), Foster (1969-1974), Joseph Sampson (1967-1972), Lois Sampson (1968-1973), Cowpers (1966-1970; 1973-1974) and Bonilla (1968-1973) were involved in drug transactions with the core for a period of five years or more. The remaining five—Schennault (1971-1974), Wilson (1971-1974), Laws (1971-1972), Morris (1968-1972), Mitchell (1972-1973) and Davis (1968-1972)—sustained their dealings over substantial periods of years as well. Since narcotics were available virtually upon demand, these defendants knew that the core group had a steady stream of supply, supported by an organization of importers and couriers, from which they all benefitted.

In such a conspiracy, "the point of course, is that each level of the operation depends upon the existence of

the other, and the mutual interdependence of each is fully understood and appreciated by the other." *United States v. Bynum*, *supra*, 485 F.2d at 495. Thus, a defendant active and participating in a conspiracy such as was conclusively demonstrated here "knows that it has a scope and that for its success it requires an organization wider than may be disclosed by his personal participation," *United States v. Agueci*, *supra*, 310 F.2d at 827. Indeed, each major purchaser is properly charged with a presumption of knowledge "that he is a part of a wide-ranging venture, the success of which depends on the performance of others whose identities he may not even know". *United States v. Ortega-Alvarez*, *supra*, 506 F.2d at 457. And, of course, the size of the operation and the quantity of drugs supplied and purchased are themselves clear indications which "a jury might consider" to show clearly the existence of "a large scale, continuing conspiracy." *United States v. Armedo-Sarmiento*, 545 F.2d 785, 790 (2d Cir. 1976).

The "mutual inter-dependence" between the conspirators emphasized in *Bynum* was amply demonstrated at trial. Each of the appellants was aided by and profited from the fact that the core group could turn to different customers and different suppliers in the case of need. Thus, the growth of the conspiracy, its eventual size and its diversity of product, supplier and consumer, facilitated its workings: small and occasional losses could be sustained without serious interruption in the flow of drugs to and from the core.* Occasional arrests of co-conspira-

* Brown testified, for example, that he was often "beat"—not paid—for packages of drugs. Given the volume of business, he could absorb such losses with scarcely any concern as a minimal cost of business. Such equanimity would not have been possible if this conspiracy had been limited, for example, to a single wholesale purchaser. (Tr. 1719-1720).

tors could be absorbed without the danger to suppliers and wholesale purchasers that the stream of merchandise and profits would be even momentarily halted. Moreover, the overall size of the conspiracy allowed the core group to purchase narcotics in bulk quantities at reduced prices from the suppliers, and to provide high quality narcotics to the wholesale customers at a low price with predictable regularity. Finally, the duration of the instant conspiracy itself clearly manifested a single, on-going enterprise. The participants here were not on and off the scene at irregular intervals, but persisted in a steady and repetitive series of transactions with Brown which accounted for an unceasing flow of narcotics from suppliers to middlemen to purchasers. This steady and uncomplicated course of transactions over a series of years drew a simple picture of the single enterprise proved at trial, and plainly justified the jury's inescapable conclusion that each convicted defendant was a knowing and active member of a single large-scale drug network.*

* There also was ample evidence showing actual relationships between many of the co-conspirators. It was clear that at least from 1969, the sole suppliers of heroin to the core group were Intersimone and Capra, Guarino and Dellacava, and the sole suppliers of cocaine were Alvarez and Rodriguez. Thus, all of the heroin and cocaine purchased by the wholesale customers from Brown were furnished by these suppliers-conspirators. Moreover, the evidence showed that Brown would discuss with Intersimone the truthworthiness of his other suppliers and Intersimone advised Brown as to whom to trust and whom not to trust. While Capra, Guarino and Dellacava supplied Brown with heroin, he in turn regularly furnished them with much smaller amounts of cocaine, presumably for their own use, often referred to as *hors d'oeuvres*. Indeed, at one point Leo Guarino asked Brown if Brown would like to buy cocaine, and Brown told Guarino that he already had his own connection. (Tr. 1119-1122).

Similarly, as noted above, all the customer-appellants were involved either directly or indirectly in both cocaine and heroin

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Appellants predictable reliance on *United States v. Miley*, 513 F.2d 1191 (2d Cir. 1974) and *United States v. Bertolotti*, 529 F.2d 149 (2d Cir. 1975), is misplaced.* Those cases turn on factual situations totally at odds with

transactions for a period of several years. As to the core group, both Parker and Moten had actual knowledge of the full extent of Brown's enterprise. These conspirators made no principled distinction between heroin and cocaine, but instead benefited from the variety of the core's offering; the concern of these defendants was, simply, the buying and selling of narcotics.

Finally, as discussed in the Statement of Facts, *supra*, the record is filled with evidence of actual cross-links between the appellants, which establish actual knowledge on the part of the defendants of the scope of the conspiracy. See the discussions, *supra*, at pages 11, n. 3; 13, n. 2; 14, n. 3; 15, n. 2; 16, n. 1, n. 2; 20, n. 2; 24-25 and 25, n. 1; 27, n. 1; 32, n. 2; 35, n. 1; 36, n. 2, 38 (where Laws tells Brown he knows what Brown is doing); 44, n. 1; and 46 n. 1.

Appellants' almost faint-hearted reliance on *Kotteakos v. United States*, 328 U.S. 750 (1946) is in any event misguided. In *Kotteakos*, a loan-fraud case, the Government conceded that the proof showed at least eight discrete and independent conspiracies. 328 F.2d at 754-55. It can hardly be asserted that the evidence in this case conformed to such a pattern. *Kotteakos*, as this Court has held, has no applicability to narcotics conspiracies of the kind proved at this trial. *United States v. Rich*, 262 F.2d 415 (2d Cir. 1959). Nor can it be said that the evidence in this case raised the hypothetical question suggested in *United States v. Borelli*, 336 F.2d 376 (2d Cir. 1964), *cert. denied* as *Cinquegrano v. United States*, 379 U.S. 960 (1965), whether persons at the extreme end of a chain conspiracy adopt the attributes of participants in a "spoke" conspiracy, 336 F.2d at 383, since, as discussed above, the complaining defendants here are large-scale wholesalers only one step removed from the core and therefore hardly peripheral figures, Cf. *United States v. Cirillo*, 468 F.2d 1233, 1238 (2d Cir. 1972), *cert. denied*, 410 U.S. 989 (1973). Even so the district judge frequently reminded the jury, both during the trial and particularly in his charge, to focus separately on each defendant and that guilt, if any, was

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the compelling proof of a single conspiracy here. In *Miley*, for example, this Court was concerned with sales of LSD and PCP, domestically manufactured hallucinogenic-type drugs, in small dollar amounts over a period of four months. While different groups of defendants were linked to a single core, no links were established between the different groups. This Court reaffirmed its commitment to the view that in "traditional" heroin and cocaine chain conspiracies, knowledge of the overall structure of the organization may be inferred. 513 F.2d at 1206. The *Miley* Court simply concluded, however, that as a factual matter, the proof failed to establish that the core conducted "a regular business on a steady basis." 513 F.2d at 1207. Here, the core of Brown, Moten and Parker conducted not merely steady, but non-stop business in large amounts of heroin, which even common citizens know must be imported, see *Turner v. United States*, 396 U.S. 398, 407, 415-16 (1970), and in huge amounts of cocaine which required the organizational and financial contributions of others. Thus, unlike *Miley*, in the present case there were not only direct connections and associations between the levels of the conspiracy, but the very scale of the operation could not have been conducted in a profitable manner without awareness of its general scope and size.

Nor does *United States v. Bertolotti*, *supra*, support appellants' claims. *Bertolotti* was a truly *sui generis* case in which the evidence established that the core de-

personal. See, e.g., Tr. 505-06, 8646-47, 8958-8963. Moreover, following this Court's suggestion in past cases, the district judge marshalled the proof as to each defendant, thereby stressing to the jury the importance of individual consideration of guilt or innocence. See *United States v. Sisca*, *supra*, 503 F.2d at 1345; *United States v. Kelly*, 349 F.2d 720, 757 (2d Cir. 1965), *cert. denied*, 384 U.S. 947 (1966).

fendants had been involved in no more than a series of cash thefts or "ripoffs" with different groups of narcotic suppliers, not in actual drug sales. Since no large-scale core operations had been established, the jury had been furnished no basis upon which to conclude that one "supplier"—even generously applying the term—had reason to know of the existence of others. The loose-knit vertical organization that triggers operation of the inference of knowledge in the *Bynum-Arroyo-Ortega-Alvarez-Mallah-Tramunti* lines of cases, *supra*, simply did not appear in the evidence at the *Bertolotti* trial. Accordingly, since the bulk of proof there concerned "ripoffs" and the jury heard highly prejudicial tape recordings—including racial slurs—that would have been inadmissible at the trial of a properly shaped indictment, all convictions were reversed. In sum, the theory of *Bertolotti* is inapplicable to a case such as this in which the core conspirators were involved in the highest level heroin and cocaine transactions for a period of at least six years in a continuous fashion. *United States v. Leong*, 536 F.2d 993, 995 (2d Cir. 1976).*

Since all of the co-conspirators shared in the ultimate aim to place narcotics in the hands of ultimate users, *United States v. Rich*, 262 F.2d 415, 418 (2d Cir. 1959), and shared in the profits of the conspiracy, appellants should not now be heard to disclaim the advantages of their mutual collaboration. In the circumstances of this

* The Government advanced this argument before the trial judge in a memorandum of law filed May 28, 1976, in opposition to defendants' motions for severance based upon the indictment format. The District Court denied the *Bertolotti* motions in an opinion dated June 24, 1976. Thereafter, this Court adopted the same view of *Bertolotti*, limiting it to its peculiar set of facts, in *United States v. Leong*, 536 F.2d 993, 995 (2d Cir. 1976); *Cf.*, *United States v. Hinton*, 543 F.2d 1002, 1014 (2d Cir. 1976).

trial, given the scope and success of the enterprise, it simply cannot seriously be argued that a jury properly charged, as this jury concededly was, could not find that the defendants were part of a single conspiracy.*

* Several of the appellants' claiming to have been at most only minor traffickers, virtually stumble over each other in their haste to fall under the protective ambit of this Court's apothegmatic dictum in *United States v. Tramunti*, *supra*, 513 F.2d at 1112. ("When the Government throws out its big conspiracy net to catch the big fish in the criminal sea, it has to be aware that an occasional minnow may wriggle free"). Appellant Moten inveighs against the Government's inclusion of him in a narcotics indictment when it proved "only" two actual sales by him, of one kilogram each, amounts which he caustically refers to as "small." (Br. 16). Appellant Morris states, without further elaboration, that there was insufficient evidence linking him to the conspiracy but suggests that his dealings were only personal and isolated. (Br. 4-5). Appellant Mitchell states, without further elaboration, that there was insufficient evidence of his membership in the conspiracy and that he was at most a "casual facilitator." (Br. 20). Appellant Cowpers states, without further elaboration, that there was insufficient evidence to support the verdict. (Br. 7). Appellant Bonilla argues there was insufficient evidence to show that he knew or should have known of the larger conspiracy. (Br. 21). To the extent that some of these claims, such as that narcotic purchases were for personal use, are more properly defenses at trial rather than legal claims on appeal, it is sufficient to note that these claims were rejected by the jury. As to the sufficiency of the evidence, the proof as against each appellant is reviewed separately in the Statement of Facts. That review makes clear that none of these appellants had dealings "on one occasion only, with a lesser figure for a small amount," *United States v. Tramunti*, *supra*, 513 F.2d at 1112, but all were, instead, regular and steady purchasers from Jack Brown for periods of years and in amounts sufficient for the jury unquestionably to have concluded that they were plainly aware of the scope of the larger conspiracy. Morris, for example, was a dealer in heroin and cocaine on a daily basis from 1963 to 1972, and was involved in substantial narcotics activities through 1974, see *supra* at 43-46. Mitchell can hardly be viewed as a "casual facilitator" when the evidence shows that he was dealing hand-to-hand with

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2. Severance

Appellants also complain that the district judge's denial of motions for severance prior to * and during trial, resulted in a "mass" proceeding which denied them a fair trial. This claim, resting as it does upon an inaccurate and misleading presentation of the facts, the surrounding circumstances of the trial, and a misconception as to the applicable law, should be rejected.

A motion for severance is addressed to the sound discretion of the district judge, *Opper v. United States*, 348 U.S. 84, 95 (1954); *United States v. Projansky*, 465 F. 2d 123, 138 (2d Cir.), *cert denied*, 409 U.S. 1006 (1972), and the denial of a motion for severance may not be reversed absent a clear showing that there has been an

Brown in substantial amounts of drugs, see *supra* at 43-46. Cowpers was nothing if not a wholesaler of heroin and cocaine every day he was not in jail, dealing with Brown from 1966 to 1970 and again from 1973 to 1974 in bulk weight, see *supra* at 36-38. Bonilla here, as at trial, likes to refer to himself as a trivial figure, but his five year dealings in heroin and cocaine, as much as half-kilogram quantities, did not mislead the jury, see *supra* at 42. Moten's petulant complaint about the proof against him, to the extent it rises to the level of a claim about the sufficiency of the evidence, is treated fully *supra* at 12-17.

* All but one defendant moved for a severance pre-trial. Appellant Cowpers, however, opposed a severance, his counsel arguing that from his past experience multi-defendant trials worked to his clients' advantage. (H. Tr., June 4, 1976 at 67; Tr. 2463).

The motions were argued on June 4, 1976, at which time 29 defendants were scheduled for trial. Thereafter two defendants, Reynolds and Sureda, agreed to plead guilty and testify. The judge in his discretion severed defendants Capra, Guarino and Dellacava, who were incarcerated, who had refused to accept two rounds of assigned counsel and who, though wishing to obtain their own counsel, had not done so by mid-June. The judge also granted a severance to defendants Helen Kelleem, who was ill, and Solon Glaze, whose attorney suffered a death in the family during jury selection.

abuse of that discretion. *United States v. Taylor, supra*, slip op. at 2833; *United States v. Turcotte*, 515 F.2d 145, 150 (2d Cir. 1975); *United States v. Jenkins*, 496 F.2d 57, 67-68 (2d Cir. 1974), *cert. denied*, 420 U.S. 925 (1975). The general rule is, of course, "... that persons jointly indicted should be tried together ... where the indictment charges ... a crime which may be proved against all of the defendants by the same evidence and which results from the same or a similar series of acts." *United States v. Kahaner*, 203 F. Supp. 78, 80-81 (S.D. N.Y. 1962), *aff'd*, 317 F.2d 459 (2d Cir.), *cert. denied*, 375 U.S. 836 (1963). The established rule in this Circuit is that a defendant "must demonstrate substantial prejudice from a joint trial, not just a better chance of acquittal at a separate one, and that a trial court's refusal to grant a severance will rarely be disturbed on review." *United States v. Fantuzzi*, 463 F.2d 683, 687 (2d Cir. 1972), *quoting United States v. Borelli*, 435 F.2d 500, 502 (2d Cir. 1970), *cert. denied*, 401 U.S. 946 (1971). Nor is a defendant entitled to a severance "merely because the evidence against a co-defendant is more damaging than the evidence against him." *United States v. De LaRosa*, 450 F.2d 1057, 1065 (3d Cir. 1971), *cert. denied*, as *Jones v. United States*, 405 U.S. 957 (1972). The application of these principles to the issues at hand makes clear that the reasoned and deliberate decisions by the conscientious and diligent trial judge dealing with the numerous claims of severance made in this case were sound and proper.

a. Pre-Trial Motions Based Upon Claims of Multiple Conspiracies

Appellants pre-trial arguments before the trial judge in behalf of severances relied heavily on the claim that the indictment charged and the proof would show multiple conspiracies. Prior to trial and pursuant to a suggestion of defense counsel the Government submitted grand jury

testimony of the principal Government witnesses to the District Court *ex parte*. Accordingly, the district judge had before him for consideration a preview of the Government's proof at trial and the bulk of the testimonial evidence upon which the indictment was based. He was, therefore, in a position to evaluate the relative complexity of the expected proof at trial and the potential harm, if any, to the various defendants joined for a single trial.* Having found sufficient basis for the indictment and no showing of prejudice having been made, the court denied the motions for severance with leave to renew the motions during trial. Since, as demonstrated above, there was more than sufficient evidence at trial of a single conspiracy, the renewed motions for severance on that score were properly denied.

b. Fairness of the trial

Appellants suggest, however, that even conceding that the indictment charged only one conspiracy, that the proof at trial established the existence of only a single conspiracy and that joinder of the defendants was proper under Fed. R. Crim. P. 8, still the district judge abused his discretion by allowing a single trial of twenty-two defendants. They argue that the District Court, under its supervisory authority, should have restructured a properly voted and properly presented indictment in such a way as to allow for four separate trials (Moten Br.

* The Government also submitted to the court a five-page memorandum, dated April 5, 1976, outlining the theory of the Government's case as a single conspiracy and which detailed the careful review given the case by the United States Attorney, pursuant to this court's instructions in *United States v. Sperling*, 506 F.2d 1323, 1340-41 (2d Cir. 1974), *cert. denied*, 420 U.S. 962 (1975). Defense counsel objected to the court's consideration of this memorandum *ex parte* and the court did not read it. (H. Tr., June 4, 1976, at 97-98).

9-10)*, relying principally on certain pronouncements of this Court in *United States v. Sperling*, *supra*, 506 F.2d at 1340-41. Appellants contend that the district judge's failure to grant their motion was error requiring reversal.**

* The suggested division along geographic lines labelled "New York," "Florida," "Chicago" and "Washington" bore no relation to the evidence. Wilson and Laws, two *New York* dealers, would have been set for trial by the defendants with the *Florida* cocaine suppliers; Albert Jones, a *New York* heroin and cocaine dealer, would have been set down for trial with the *Washington* group. Moreover, Cowpers and Laws, and Wilson and Jones, whom the evidence showed were partners, would have been tried in different trials if the defendants had had their way. One wonders why Moten would suggest that a core figure like himself be joined with one group, and not with Alvarez and Rodriguez, whose money he knowingly washed and against whom the Government's case was powerful. Could the "Chicago" trial have proceeded after Capra, Guarino and Dellacava were severed, and Williams a fugitive, with Schennault, O'Dood and Morgan? Morgan's attorney would hardly have thought so, since there was substantial evidence against Schennault, much less against him and no more connection between him and Schennault than anyone else. These questions by no means exhaust the range of absurdities that trials along the lines suggested by the defendants would have produced. Hopefully, however they demonstrate the continued wisdom of allowing prosecutors to continue to draft indictments and courts to apply their discretion in ordering trials, and not to commit to defendants the authority to decide with whom they will and will not be tried.

** Appellants also rely on *United States v. Bertolotti*, *supra*, and *United States v. Miley*, *supra*. These cases more directly relate to single vs. multiple conspiracy issues and for the reasons already discussed are inapplicable to the facts of this case. In *Sperling*, eighteen defendants commenced trial for violations of the narcotics laws including conspiracy to distribute heroin and cocaine. Two pleaded guilty during trial and five were acquitted. Although this Court affirmed the convictions of the eleven appellants and the single conspiracy theory under which they were tried, it suggested that the case was more properly viewed as two separate conspiracies—Pacelli's cocaine operation and Sperling's heroin operation—with a possible link at the top, and that

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The precise nature of this claim of error merits some preliminary discussion. These defendants do not suggest that the district judge refused to hear argument on this question, either before or during trial. Indeed, the issue was argued by counsel repeatedly at all stages of the proceedings with the court each time leaving open the possibility of severance if at any time any counsel could make a showing of prejudice as to any or all defendants. Moreover, it is conceded that the question of severance was clearly one addressed to the court's discretion. The trial judge, whose sensitivity to the rights of the defendants at all stages of the proceedings was frequently remarked upon (see, *e.g.*, Tr. 9520-22), who sat through and observed the proceedings on a daily basis and who had an opportunity to evaluate the course of the trial, saw no prejudice to the defendants from the indictment format or the trial setting. Thus the complaint here is not that the district judge failed to exercise his discretion; it is, instead, that the court, after carefully evaluating all the competing factors, exercised its discretion against the defendants.

In this context it is worth recalling that an abuse of discretion may be found only if a joint trial was "manifestly prejudicial," *United States v. Berlin*, 472 F.2d 1315 (9th Cir. 1973), or if the trial resulted in "substantial prejudice" to a defendant's right to a fair trial. *United States v. Morgan*, 394 F.2d 973, 978 (6th Cir. 1968) "A man takes some risk in choosing his associates and if he is hailed into court with them, must ordinarily rely on the fairness and ability of the jury to separate the sheep from the goats." *United States v. Fradkin*, 81 F.2d 56, 59 (2d Cir. 1935, A. Hand, J.). Because a court must consider economy of time and judicial administration, *United States v. Crisona*, 271 F.Supp. 150, 154 (S.D.N.Y. 1967, Mansfield, J.), the burden plainly is on

the wiser course would have been to proceed with two indictments. *United States v. Sperling*, *supra*, 506 F.2d at 1340-41 and fn. 25.

the defendant to demonstrate that a joint trial will deny him a fair trial altogether. *United States v. DeSapio*, 435 F.2d 272, 280 (2d Cir. 1970), *cert. denied*, 402 U.S. 999 (1971). This burden has been described as a "difficult one, and the ruling of the trial judge will rarely be disturbed on review. 8 Moore, Federal Practice ¶ 14.02[1], p. 14-3 (2d ed. 1968)." *Tillman v. United States*, 406 F.2d 930, 935 (5th Cir.), *vacated as to one defendant on other grounds*, 395 U.S. 830 (1969).

Conceding that without a showing of substantial prejudice their claim of severance must fail, appellants argue that prejudice flowed from the trial setting in a number of general ways. As we demonstrate below, there is no merit to these claims.

(1) Claim of prejudice in relation to alleged proof of similar acts

Appellants allege prejudice in testimony received at trial concerning narcotics transactions that occurred prior to 1968; which appellants, while failing to specify, simply characterize as "interminable" proof of "similar acts." In the context of the trial record, this claim is sheer fantasy and bears no relationship to the actual course of the proceedings.

To be sure, Jack Brown, during the course of his testimony, discussed each defendant on trial and the background of his association with them in narcotics, if any, prior to 1968. Brown testified in some detail about his first dealings in heroin with Intersimone in 1959 and his continuing relationship with Intersimone after 1964, when Brown was released from prison. Brown testified that Solon Glaze was a customer of his in the 1950's; that William Hightower began purchasing drugs on a steady basis in 1966, Joseph Sampson in 1967, Charles Cowpers in 1966 and that L. J. Mitchell had purchased several

ounces of cocaine in 1965 but not again until 1972. Brown also testified that Moten had been a close business associate and friend in the late 1950's, again after Brown returned from prison in 1964, and that Moten began exchanging money for Brown and introducing him to drug customers as early as 1966 and 1967. As to Angel Rodriguez, Brown testified that he began fencing stolen goods with him in 1965 and that their relationship developed into a narcotics connection in 1967. In addition, Estelle Tompkins testified that the first time she purchased narcotics from James Laws was in 1962; and Marion Ladd testified that appellants Morris and Glaze both sold drugs in the 1950's when she knew them, although she was precluded from testifying that Morris and Glaze were partners in those days.

This evidence far from being "interminable" was in fact quite limited. Moreover, it was not evidence of narcotics transactions testified to by a surprise witness with no relationship to the conspiracy; each of the witnesses who testified engaged in narcotics transactions with the defendants during the course of the conspiracy and each testified about his own dealings with the defendants. Thus the evidence of pre-1968 narcotics acts was offered and admissible as background to the conspiracy to establish its nature, scope and purpose, as well as to show the prior relationship of the witnesses with the defendants, a matter of significance to a jury in seeking to understand the basis for mutual trust between the witness and the defendants and their dealings during the course of the conspiracy. As such, this proof was admissible against all of the defendants on the issue of the existence of the charged conspiracy. *United States v. Araujo*, 539 F.2d 287, 289 (2d Cir. 1976) (prior acts of co-conspirators admissible, even if not on trial, to show existence of conspiracy charged); *United States v. Papadakis*, 510 F.2d 287, 294-295 (2d Cir.), cert. denied, 421 U.S. 950 (1975); *United States v. Cioffi*, 493 F.2d 1111

(2d Cir. 1974); *United States v. Cohen*, 489 F.2d 945 (2d Cir. 1973); *United States v. Costello*, 352 F.2d 848, 853 (2d Cir. 1965), *rev'd on other grounds as Marchetti v. United States*, 390 U.S. 39 (1968); *United States v. Witt*, 215 F.2d 580 (2d Cir. 1954); *Dennis v. United States*, 183 F.2d 201, 231 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951) ("... it is nonsense to say that events occurring before a crime, can have no relevance to the conclusion that the crime was committed; and declarations are no different from any other evidence"); *see also Lutwak v. United States*, 344 U.S. 604 (1953); *United States v. Super*, 492 F.2d 319, 323 (2d Cir.), *cert. denied*, as *Burns v. United States*, 419 U.S. 876 (1974) (post-conspiratorial acts and declarations of co-conspirator).*

(2) Claims of prejudice in relation to alleged proof of acts of violence

There is no merit to appellants's claim that the jury was infected by the admission in evidence of testimony relating to alleged violent acts. On redirect examination,

* Indeed, the defendants received by way of the court's instructions far more than they were entitled to under the law. Although the evidence of pre-1968 acts was admissible against all of the defendants, the court charged the jury at the defendants' request that such evidence was admissible only as against the particular defendant named. The court so instructed the jury in that respect at the time such evidence was received, in its marshalling of the evidence against each defendant, and in its general discussion of the law *see, e.g.*, Tr. 8971-72.

Interestingly enough, when the Government offered to prove classic similar acts on the part of certain defendants, relating to dealings in narcotics not directly linked to the conspiracy, the district judge refused to allow the proof. For example, the Government sought to prove three sales of drugs—heroin and cocaine—by defendant O'Dood in 1973 to undercover agents in Chicago and to prove a 1972 sale by defendant Albert Lee Jones of cocaine to undercover agents in New York in 1972. Because neither sale could be shown to be in furtherance of the conspiracy, the judge denied the offer. (Tr. 5660-5677, 5694-5700).

Brown was asked about six individuals whom he had known to be narcotics dealers and who had been murdered. (Tr. 2945-2951). The testimony was proper in view of the clear attack by all defense attorneys that Brown was "paranoid," that he was testifying against the defendants from a motive of personal hostility or grudge* and that his claim to have surrendered to federal authorities because of his fear of being killed was a delusion.** Brown's testimony, elicited on redirect, that other narcotics dealers he had known had been murdered, supported his testimony on direct examination that his reason for surrendering and cooperating with the Government was because he was tired of running and afraid for his personal safety. It was within the trial judge's discretion to admit such proof, *United States v. Cheung Kin Ping*, Dkt. Nos. 411-12, slip op. 2063, 2069-71 (2d Cir. February 28, 1977), particularly since there was not the slightest suggestion that the defendants had caused the deaths of any of the individuals referred to or, with the exception of one—Willie Womack—that any of the defendants even knew the individuals. Other than this testimony, and despite appellants' undocumented suggestion that the record was filled with "inflammatory" evidence, there was no proof with respect to acts of vio-

* Some examples of such "theories" which were developed before Brown's redirect were: "paranoid," "crazed belief," that defendant caused death of his son, therefore seeking "a life for a life." (Moten) (Tr. 557-563); grudge against landlord (Brightman); jealousy over woman (Davis, Hightower, Jones); unrequited love (Schennault, Lois Sampson, Marion Dunmore); need to put Italian in case to satisfy Drug Agency (Intersimone); anger at not having been chosen as godfather of son (Mitchell); wish to obtain property (Morgan).

** The court, in overruling defense counsels' objections to this line of questioning on redirect examination, noted that with respect to Brown's stated motive for surrendering—his apprehension of danger—"more than one counsel on cross-examination raised the issue that this was an unrealistic fear." (Tr. 2947).

lence except those committed by the Government's witnesses.*

(3) Number of Defendants, Length of Trial, Volume of Evidence

Appellants suggest that the trial of twenty-two defendants, combined with the length of trial and the volume of evidence, denied them a fair trial. Similar claims have been made before and rejected. *United States v. Stromberg*, 268 F.2d 256 (2d Cir.), *cert. denied*, 361 U.S. 863 (1959) (46 indicted; 19 tried); *United States v. Aviles*,

* Certain appellants claim error in the Government's eliciting from Michael Parker, on redirect examination, the fact that he had received payments from the federal Government pursuant to his relocation in the United States Marshal's Witness Protection Program. (Tr. 4459-4461). The Government had consented to redact this information from Parker's memorandum of agreement on direct; the testimony, however, was proper redirect examination. At least two defendants, Davis and Wilson, had placed before the jury in their cross-examination of Parker the explicit suggestion that Parker received large and unspecified tax-free subsidies from the Government in return for his cooperation. (Tr. 3975, 4074-79). Moreover, although no defense counsel objected, the Government asked for a side bar during the cross-examination by Davis and alerted counsel that his inquiry, by its misleading nature, would open the door to clarification necessarily including testimony about the Witness Protection Program. Davis' response was, "What difference does that make," and continued his examination. (Tr. 4075-76). Although other counsel were present at the side bar, none objected to counsel's continuing along his chosen path. The Government, having done its best, was left with no choice but to protect itself in the approved way, *United States v. Cheung Kin Ping*, *supra*. The Government's caution in the area is demonstrated by the manner in which it proceeded in the same area with respect to Brown's testimony. When the Government sought to offer a memorandum of agreement between Brown and the Government, including promises of protection, it asked for a side bar, asked if there was an objection to the "protection" portion and, when there was, agreed to its redaction. (Tr. 1434-37).

274 F.2d 179 (2d Cir. 1960) (37 indicted; 17 tried); see also *United States v. Tramunti*, *supra* (32 indicted; 18 tried).

Appellants do not suggest a *per se* rule prohibiting trials of a specified number of defendants, nor could they reasonably do so. Their due process claim reduces itself, in essence, to the argument that in the context of this case the jury was unable to understand and intelligently weigh the evidence separately as against each defendant. The record, however, belies this claim of prejudice.

Despite its length, the evidence at trial was quite simple and straightforward.* The conspiracy proved at trial did not involve a complicated circumstantial evidence case in which the jury was required to piece together hundreds of exhibits in order to find the truth. Here, the case rested to a substantial degree upon the credibility of Jack Brown, who testified that he was a drug dealer of substantial dimension and that the defendants had traded with him in drugs. The jury was not asked to—nor did they need to—infer the participation of each defendant; instead, during the three and one-half days of Brown's direct testimony, he testified to personal dealings in narcotics with the defendants on trial.**

* It should be clear that a good part of the 9500 page record consists of non-evidentiary matter such as discussion with the court out of the presence of the jury, openings, summations and the court's charge. The summations of counsel alone take up 1620 pages of the record and the charge and deliberations another 614 pages. (Tr. 7207-8907, 8908-9522).

** Except arguably as to Nelson Alvarez who Brown said had built "traps" in Miami and had once picked up money from him in New York. Indeed, where an acquittal of a defendant did not imply disbelief in Brown's testimony—as in the cases of Nelson Alvarez, (no direct evidence from Brown as to knowledge), Donald O'Dood (Brown's testimony showed only presence during Schen-

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Although parts of remaining witnesses' testimony added additional material with respect to the scope of the conspiracy the balance of the trial consisted essentially of the Government's effort to corroborate Brown's testimony through witnesses and documents.

Moreover, the jury's deliberations in this case are particularly instructive and convincingly refute defendants' joint claim of prejudice from a single trial. The jury deliberated for six days in methodical fashion, demonstrating a keen ability to both evaluate the law * and weigh the evidence as was their task. This was not a case in which the jury was exhorted to set aside their reason and vote blanket convictions for irrational reasons; nor did the jury do so. This was a carefully discriminating jury which acquitted four defendants against whom the evidence was relatively less strong. Defendants' claims of improper "spillover" are further undermined by the jury's inability to reach a verdict as to a fifth defendant, Bernard Brightman, despite his close association with Frank Moten, one of the principal defendants on trial; its acquittal of Tony Alvarez on the § 848 count even while it convicted him on the conspiracy and substantive counts; and its acquittal of Nelson Alvarez, who was clearly not prejudiced by the overwhelming evidence against his brother. Indeed, the jury carefully

nault deals) and Marion Dunmore (Brown testimony consistent with personal use defense)—the jury did acquit.

Brown's personal involvement with each of the defendants, and Parker's testimony about the narcotics activity of all of the defendants except Nelson Alvarez further distinguishes this case from *Sperling, supra*, in which no witness testified against all the defendants and only one, Lipsky, had had dealings with both branches of the conspiracy. 506 F.2d at 1340, n. 25.

* During the course of its deliberations the jury asked for special instructions concerning the § 848 counts based on hypothetical questions. These questions suggested, by their intricacy, an intelligence on the part of the jury capable of grasping subtle legal issues relating to § 848 prosecutions which, in all candor, at least one prosecutor had not previously considered. (Tr. 9398-9420).

distinguished even between different counts in the indictment against each defendant, convicting on counts where the evidence was strong, yet acquitting where the evidence was weak or in conflict. This pattern demonstrates that the jury was able to and did perform its function of considering "individual responsibility based on 'intelligent differentiation' among defendants." *United States v. Ricco*, Dkt. Nos. 76-1129, 1152, 1191, slip op. 6157, 6166, n.5 (2d Cir. February 7, 1977); *United States v. Corr*, 543 F.2d 1042, 1053 (2d Cir. 1976).*

Appellants assert that "the sheer volume of testimony produced on behalf of the Government was enormous," and that it "concerned numerous individual transactions in cocaine and heroin between various co-conspirators." Because of this it is argued, "numerous defendants [were

* Appellants suggest that a letter written by the jury forelady to Chief Judge Irving R. Kaufman, dated November 27, 1976, mandates reversal of their convictions or, in the alternative, supports their claim that the trial setting deprived the defendants of a fair trial. (G. App. 13). As a legal matter, the juror's letter, containing no reference to "extraneous influence," may not be considered as a basis for impeaching the verdict in this case. Fed. R. of Evid. 606(b); *United States v. Dioguardi*, 492 F.2d 70, 78-81 (2d Cir. 1970). Moreover, the letter, and the circumstances surrounding its writing, demonstrate that it has little, if any, relevance to the issues raised in this appeal. The juror's questions and doubts were directed particularly to the jury system and her belief that justice would have been furthered had she been able to question lawyers and defendants personally. Nevertheless, the juror notes that she fully expressed herself in the jury room, as was her duty. (G. App. 15). Furthermore, the letter itself is especially suspect. Immediately upon the close of the case, this juror alone chose to confer with defense counsel and with those defendants who were not remanded; indeed, after court she left with defense counsel to attend a party at the home of one of the attorneys in the case given for the benefit of out-of-town defense counsel at which time the issue of her writing such a letter was discussed. The district judge, in denying motions for a new trial based upon the forelady's letter, called the propriety of the events surrounding the writing of the letter "troublesome." (Sentencing Tr., January 21, 1977, 9551-57).

forced] to sit through literally weeks of trial in which their alleged participation or involvement was never mentioned." (Moten Br. 18, 3).

In fact, however, all but a handful of exhibits and a small number of pages of testimony was admissible against all of the defendants on the single conspiracy charge. Appellants' claim of prejudice with respect to the length of the evidence suggests that the issue of the existence of a conspiracy between the defendants was somehow conceded or not an issue in the case. Quite to the contrary, however, the defendants served notice from the first court appearance that the Government would be put to the proof of its conspiracy theory. Appellants should hardly now be heard to complain that the Government proved its case too well with too much evidence. *United States v. Stromberg, supra, United States v. Aviles, supra.*

The defendants also appear to argue that the broad geographic range of the conspiracy worked some prejudice, again unspecified, on them.* In fact the conspiracy

* Two appellants, Morris and Bonilla, raise additional claims of prejudice specific to themselves. In particular, Morris complains that he was prejudiced as a result of cross-examination by defense counsel which elicited the fact that Morris had been in prison. (Tr. 1673). Since the error was not provoked by the Government, since the witness' answer was spontaneous and not designed to prejudice the defendant, since the Government objected first to the question, and the court immediately struck the answer and cautioned the jury to disregard it, any error was cured. *United States v. Stromberg, supra*, 268 F.2d at 269 (in virtually identical situation, where answer unforeseeable, not induced by prosecution, jury instructed to disregard answer, and incident isolated, held error cured), *see also United States v. Leong, supra*, 536 F.2d at 997; *United States v. Bentvena*, 319 F.2d 916, 931 (2d Cir.), *cert. denied*, 375 U.S. 940 (1963); *United States v. Valdez*, 418 F.2d 363, 364-65 (5th Cir. 1969).

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was rather narrowly confined. Between 1968 and 1973, Jack Brown lived in the New York area. Three or four times each year Miami defendants would come to his home, deliver suitcases filled with cocaine, and receive payment. At the same time Brown received heroin in New York from his New York suppliers. Customers, from New York, Washington and Chicago, would periodically visit Brown in his apartment in New York and

Appellant Bonilla also complains that co-counsel in cross-examination of Brown, brought out references to his client which were prejudicial. The substantive matters brought out related to a shooting incident by Brown at 200 West 90th Street and Bonilla's activities with Brown during the latter's fugitivity. Both matters, however, had been properly elicited on direct examination. Moreover, neither area was prejudicial; in fact, the shooting incident related only to Brown, who had done the shooting. In any event, Bonilla's failure to object at trial bars any consideration of his claim here. Bonilla's suggestion that he was a "minor" figure in the conspiracy, besides its irrelevance, is inaccurate. Only in comparison to a drug dealer of Brown's type could Bonilla be viewed as "minor" inasmuch as he was a continuous dealer in heroin and cocaine from 1968 to 1973, in eighth kilogram amounts. Moreover, Bonilla could not have believed that a "low-profile" trial strategy necessitated a refusal to object to what he believed was improperly admitted and prejudicial testimony. The more likely situation is that counsel happily waited until the testimony was completed before making any objection so as to create a putative, though barely arguable, issue for future proceedings.

Bonilla in a general way attacks the "atmosphere" of the trial. Unlike other multiple defendant cases, however, this was not a trial which required extreme steps by the trial judge in order to maintain courtroom decorum as a result of outbursts during the proceedings, *Illinois v. Allen*, 397 U.S. 337 (1970) (defendant removed during trial because of disruptive and abusive behavior); *United States v. Marshall*, 458 F.2d 446, 451-52 (2d Cir. 1972) (Court repeatedly instructed jury to disregard disruptions by one of the defendants); *United States v. Bentvena*, *supra* (several defendants ordered gagged and shackled and additional United States Marshals were deployed after jurors were pushed

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purchase their drugs. After Brown became a fugitive in 1973, he moved to Florida where he obtained cocaine from the Alvarez-Rodriguez combine and serviced customers who came to see him, or sent Parker to Washington, D.C., with deliveries, a pattern that continued through 1974. There was nothing complicated about this course of dealings or the evidence describing it. The operation was as simple as it was efficient, and clearly understandable to the jury.

in the jury box, a chair thrown at the prosecutor and verbal abuse suffered by all). The proceedings at this trial were orderly and efficient and conducted in an atmosphere of complete decorum.

Moreover, Bonilla, alone of all appellants, claims that the Government's rebuttal summation unfairly tarred him with a brush properly applied only to his codefendants. The claim is without merit. First, even Bonilla's counsel succumbed to the temptation to attack personally Government counsel and the Government's witnesses. Although he acknowledged that the prosecutors were "decent" people, he thought Jack Brown was a "wiseguy" (Tr. 7999), with a "convenient memory" (Tr. 7998), that he had "delusions" (Tr. 8002) and, inevitably, that the testimony of the witnesses were "lies." Bonilla's counsel sought the benefit of his co-counsel's work when he told the jury, "You know about Jack Brown and he has been well described and I am not going to spend much time describing him and his idiosyncracies and drug habits and so forth. That has been done and maybe other counsel will do it." (Tr. 7999). Unable to resist the temptation, however, he called the case, "trial by shotgun, by ambush" (Tr. 8011) and concluded by attributing a personal motive for the prosecution to the prosecutor, saying "the facts which [the prosecutor] glossed over [in his summation] do not support his desire, the Government's desire to have my client convicted." (Tr. 8014).

In its rebuttal summation the Government was faced with the concededly difficult task of responding to a host of extreme, vituperative and extra-record personal attacks upon the prosecutors and Government witnesses and at the same time dealing with the record. Even Bonilla concedes that the Government's rebuttal summation contained arguments fully responsive to attacks made by defense counsel, representative examples of which include suggestions that the prosecutor furnished heroin

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This Court's decision in *United States v. Stromberg, supra*, provides a useful benchmark against which to judge the fairness of the joint trial in this case. In rejecting appellants' "mass trial" argument in *Stromberg*, the Court did not rest on the fact that other trials of large numbers of defendants had been upheld, but on the fact that

"in the context of this trial, nothing in the issues, the evidence or the rulings warrants a conclusion that the number of defendants prevented the jury from appraising the independent evidence against each defendant and meting out individual justice under the law." 268 F.2d at 264.

In *Stromberg*, as here, the Government's case rested on the testimony of a limited number of witnesses and "surely it was not beyond the capacity of the jury to

to Brown as part of his agreement to cooperate (Moten, Tr. 7713-14); that Brown was a "damn liar" and that the prosecutor, because he "likes to win his case", engaged in "innuendo" and was required by his boss and his job to put "liars on the stand" (Brightman, Tr. 8068-69, 8081); that Brown was an "out and out liar" and that the Government added a few defendants to the indictment for "window dressing" (J.P. Morgan, Tr. 7799, 7807).

Accordingly, although the Government responded to these arguments, it also urged the jury to remember that each defendant was to be considered separately (Tr. 8650), and, in reviewing the summation of each defense counsel, pointed out which ones had attacked the Government and which ones had not. (See colloquy between court and counsel at Tr. 8700.) Thus, in rebutting Bonilla's summation, the prosecutor began by noting that Bonilla's counsel had argued from the record, and had not personally attacked the Government which, in view of his actual comments, gave him more than he was entitled. (Tr. 8714). The prosecutor's summation was proper and caused no prejudice to Bonilla.

Finally, both Morris' and Bonilla's individualized claims of prejudice are belied by the jury's acquittal of each defendant on one substantive count, a further measure of the jury's ability to consider the evidence carefully as to each defendant on trial.

decide whether these witnesses were to be believed." *Id.* at 265. Determining the issue of each defendant's membership in the conspiracy was hardly a "task of insuperable difficulty" given the court's clear instructions and the fact that "there was nothing particularly complicated about the independent evidence which connected each defendant to the conspiracy." *Id.* at 265. And, the fact that the evidence was dispersed throughout the trial record did not undo the clear conclusion that a properly charged jury could successfully find the facts and reach fair verdicts as to all defendants. Moreover,

"even if it might have taxed the capacity of a jury single-handed, with memory of the evidence unrefreshed, to filter out and collate the several items of evidence relating to the connection of each defendant, this jury had the aid of a summary of such evidence given by the judge in his charge. Notwithstanding the number of defendants, we are confident that aided by the judge's charge the jury had in mind the evidence unconditionally received against each defendant which linked him with the conspiracy." 268 F.2d at 265.*

Finally, the *Stromberg* Court recognized the point—completely overlooked by the defendants here—that even separate trials would have involved the same overall proof

* It is worth noting that the prosecutor's initial summation was hardly a flag-waving appeal to irrational prejudice; it was, instead, as the absence of objection suggests, a lengthy review of all the evidence against each defendant. Indeed, the rebuttal summation was fully responsive to defense summations, as they conceded. (Tr. 8774). Thus, the Government's summation, the defense summations, which also reviewed the evidence, and the judge's charge gave the jury a full week and one-half of solid review of the evidence. Points left unclear could be and were reviewed again when the jury asked for testimony to be read during deliberations.

by the Government and thus would not have uncomplicated the case further:

"Moreover, we must not lose sight of the fact that the difficulties which the appellants envisage stem from the number of conspirators rather than the number of defendants on trial. The same evidence would have been admissible similarly subject to connection and the same problems would have arisen if each of the appellants had been tried separately. In the one situation as in the other, the number of conspirators would have been the same. * * * And of course conspirators are not entitled to immunity merely because there [sic] number is great. * * * Indeed, broadly considered, the large conspiracies are potentially more dangerous than the small ones." 268 F.2d at 266.*

* It bears special emphasis that the essence of the charge and of the proof here was of a massive, sophisticated and single narcotics enterprise which, given its dimensions and efficiency, posed enormous dangers to the public-at-large in several cities. Indeed, this single network accounted for untold numbers of distributions to street addicts. Under the circumstances of this case the Government was entitled to prosecute these conspirators in the precise format in which the operation existed and performed its nefarious transactions, and in the context of a single trial in which all of the participants were present and accounted for. When all the circumstances of this case are taken into account, including the grave concern for the safety of the witnesses, and the trying pressures on such witnesses to recount their continuous transactions on repeated court appearances over a substantial period of time, the single prosecution in this case was proper. Moreover, the facts that Brown was proceeding throughout with the knowledge that money had been offered for his life, that during trial and prior to Parker's testimony his mother was told she would be murdered if he testified, and that a juror was obviously tampered with, demonstrated the type of enormous obstacles that would have impeded multiple trials on this indictment.

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The conclusions of this Court in *Stromberg* are especially apposite to this case where, as we have demonstrated, the proof was relatively simple and straightforward and the jury, by its thorough and careful determinations, manifested both a clear comprehension of the evidence and a commendable sense of fairness in their deliberations.

In sum, the trial of these defendants was conducted by a district judge vigilant over and concerned with the rights of these defendants to whose discretion motions for severance were made almost daily, and who, after evaluating the progress of the trial on a daily basis, concluded that no showing of prejudice had been made. What was said in *United States v. Aviles, supra*, 274 F.2d at 194, on this precise issue, applies equally as well here:

"The question of how many co-defendants should be tried at one trial is within the discretion of the trial court and there is no support for the claim that that discretion was abused here. The rights of each defendant were scrupulously guarded by the trial judge throughout the trial. In the number of extra challenges allowed in the jury selection,* the latitude of cross-examination, the one week allowed for defense summations,** and

We point these factors out to demonstrate that the Government did proceed in accordance with the cautionary instructions of this Court in *Sperling* and *Miley, supra*. Indeed, it was just these warnings that accounted for the absence from the indictment of even substantial narcotics violators whose participation in the conspiracy ended prior to 1971 (but who were arguably chargeable in this indictment), and the scores of individuals who dealt with Brown on a smaller scale even within the period of the statute of limitations. (GX 3505K id.). The resulting indictment in this case was the product of careful consideration that sought to balance legitimate law enforcement and public protection interests with equally important individual rights to due process.

* The defendants in this case were allotted 20 challenges, the Government 12.

** The defense summed up on October 26, 27, 28, 29, November 1, 2 and part of November 3.

the patience shown in listening to numerous motions of the many counsel, the trial judge was eminently fair Moreover, the court's charge to the jury fairly summarized the evidence, distinguished the case of each defendant and emphasized the requirement of separate consideration of the case as to each defendant. Under these circumstances, there can be no complaint of prejudice from such a joint trial."

The trial was conducted in proper fashion, in a setting of respect for the judicial process in which all parties, including, to their credit, the defendants, joined. The defendants received a fair trial and the jury's verdicts should not be disturbed.

POINT II

The Various Claims of Error With Respect to the Admission of Evidence Are Without Merit.

Appellants claim a variety of errors relating to the district judge's rulings admitting and excluding certain evidence. These claims are without merit.

1. Admission of Photograph of James Laws

At trial Brown was unable to identify the defendant Laws during his testimony although he gave a correct description of his appearance. (Tr. 1107, 1207). Accordingly, the Government sought to introduce evidence of a prior photographic identification by Brown which had been witnessed by a New York City Police Officer assigned to the United States Attorney's office for the investigation of this case. Laws argues that this photograph, marked as Government Exhibit 136, was erroneously admitted into evidence after having been inadvertently referred to by the witness as a New York

City Police Department photograph. (Tr. 5869-5880). "Misleading" is perhaps the most generous description of this argument. In fact, because of the officer's reference to the photograph as a mug shot, the court struck the evidence and testimony from the record the following day *before the jury had learned* who was depicted in the photograph. (Tr. 5893-5899). Some five days later, through a different witness, DEA Agent Samuel, another photograph of Laws identified by Brown from an entirely separate photo-spread on a different day was received in evidence, the *only* such photograph of Laws ever placed before the jury. (Tr. 6204-08; GX 159D).

Since the admission of a prior photographic identification was proper, see Fed. R. of Evid. 801(d)(1)(C), and since the photograph bore none of the improper hallmarks noted in *United States v. Harrington*, 490 F.2d 487, 495 (2d Cir. 1973), there was no error.

2. Testimony of Tompkins Concerning 1962 Heroin Purchase from Laws

Laws complains that brief testimony by Estelle Tompkins that she purchased one ounce of heroin from him in 1962 was offered only to prove his bad character and was therefore inadmissible. The evidence, however, was properly received under *United States v. Araujo*, *supra*, 539 F.2d at 289 and cases cited, *supra* at 67. Laws was charged with a conspiracy to distribute heroin and cocaine. Brown testified that Laws purchased cocaine from him between 1970 and 1972. Tompkins, however, testified that in 1966 or 1967 when she needed a new supplier of narcotics, Laws introduced her to Cowpers, from whom she purchased cocaine and then heroin through 1969. Since Tompkins paid for her drugs in clothing which Cowpers and Laws shared, the jury could properly have concluded that Laws and Cowpers were associates in the narcotics business selling

heroin purchased by Cowpers from Brown to Tompkins. To this end, Tompkins' testimony that Laws had referred her to a previous heroin supplier named "Shirt" in 1965, and had himself sold her heroin on one occasion in 1962, gave the jury a basis for understanding the link between Cowpers and Laws on the one hand, and the witness on the other. (Tr. 1207-10a, 5789-5804).

Moreover, Tompkins testified that she had been an informant for law enforcement agencies from 1961 through 1970 and again on one occasion in 1973, and that it was "no secret" to Laws that she was cooperating. (Tr. 5758-64; 5825). It was certainly to be expected that Laws would argue, as he in fact did in summation, that he would not have been engaged in narcotics transactions with a known informant. (Tr. 8186). But the jury was entitled to find that if Tompkins was a drug addict throughout the 1960's as she testified, and as counsel for Laws asked the jury to believe, then Tompkins surely purchased her heroin from someone, and that she protected her source of drugs from law enforcement officials. The jury could therefore have concluded that Laws, having sold heroin to Tompkins in 1962 and not having been arrested, knew that Tompkins was unwilling to inform on him as long as he continued to furnish her with sources of drugs. Thus, the 1962 heroin transaction supported the Government's theory that Tompkins and Laws were old associates, that a mutual trust had developed between them despite her informant status, and that their narcotics relationship during the course of the conspiracy was explained by their prior course of dealings. *United States v. Dennis, supra*, 183 F.2d at 231.

3. Tompkins Testimony Concerning the 1968 Barbershop Heroin Transaction Involving Foster and Hightower

Foster complains that testimony by Estelle Tompkins concerning a 1968 heroin transaction among Foster, Hightower and George Willis, in Washington, D.C., was based upon impermissible hearsay and was so prejudicial as to require reversal. The claim is without merit.

Brown testified that Foster and Hightower were partners in the narcotics trade, and that they purchased heroin and cocaine from him from 1968 through 1974. Tompkins' brief testimony simply corroborated the drug partnership between Foster and Hightower during the course of the conspiracy. According to Tompkins, on a day in 1968 she went to the barbershop of George Willis, a sometime paramour and friend, "to get some drugs." Tompkins "had to wait for drugs from George" because "he was out [of heroin] at the time." Thereafter, Hightower and Foster arrived at the barbershop and waited outside. Willis went outside, talked with them, returned and five or ten minutes later gave Tompkins twenty capsules of heroin. (Tr. 5764-5776).

Foster argues that the inference that Foster and Hightower furnished the heroin is based upon Tompkins' testimony that Willis did not have heroin when she arrived at the barbershop, that no proper foundation was established for the admission of that fact, and that it undoubtedly was based upon a statement by Willis which, if so, was inadmissible hearsay.

The testimony was admissible on a number of permissible theories. Tompkins testified that Hightower was a regular supplier of heroin to Willis in 1968 and 1969. (Tr. 5780-84). Since Brown testified that he supplied Hightower and Foster with heroin in this period, there

was sufficient independent non-hearsay testimony to link Willis to the conspiracy charged in this indictment, *United States v. Geaney*, 417 F.2d 1116 (2d Cir. 1969), to render Willis' statement that he was out of heroin, assuming he made it, a statement in furtherance of the conspiracy and therefore admissible. Fed. R. of Evid. 801(d)(2)(E). In the alternative, Tompkins' testimony when combined with Brown's was at least sufficient to establish an agency relationship among Foster, Hightower, Willis and Tompkins such that Willis' statement would have been admissible as a statement of an agent concerning a matter within the scope of his agency and made during the course of the relationship. Fed. R. of Evid. 801(d)(2)(D).

Moreover, again assuming that Tompkins testimony was in part based upon Willis' statement, such a statement, that he was "out" of heroin, was admissible as a verbal act. Here Tompkins came to Willis for heroin and he had none to give to her. Any statement by Willis to that effect simply explained his act, or more precisely his non-act. The statement would fall clearly within the line of cases "in which the utterance is contemporaneous with a non-verbal act, independently admissible, relating to that act and throwing some light upon it." *United States v. Annuziato*, 293 F.2d 373, 377 (2d Cir. 1961), quoting *A Suggested Classification of Utterances Admissible as Res Gestae*, 31 Yale L.J. 229, 236 (1922). See also, McCormick, *Evidence* (2d ed. 1972) § 249, p. 589. Here, Tompkins' waiting in the barbershop, and the events that transpired, are explained by Willis' statement accompanying his inability to furnish her with heroin until the arrival of Foster and Hightower. *United States v. Ortiz*, Dkt. No. 76-1460, slip op. 2789, 2791, fn. 3 (2d Cir. April 11, 1977).

In any event, any error was assuredly harmless. Tompkins would certainly have been permitted to testify that she went to Willis' barbershop to obtain drugs. Fed. R of

Evid. 803(3); see generally, *United States v. Stanchich*, Dkt. No. 502, slip op. 1277, 1283 n.1 (2d Cir. January 6, 1977). She then permissibly could have testified that she asked Willis for drugs before Foster and Hightower appeared, and that she did not obtain any until after Willis met with them, allowing the same inference that Foster and Hightower furnished the heroin. Her testimony differed from this clearly permissible model only to the extent she testified that Willis was "out" of heroin, rather than simply saying she did not get heroin. The difference is trivial.*

4. Evidence of 1974 Heroin Sale by Solon Glaze

Morris argues it was error for the Court to permit testimony concerning an April, 1974 heroin transaction at the Casbah bar between police officer Dorothy Johnson and Solon Glaze, a defendant not on trial. During this transaction Morris was nearby, and a car registered to him at the address of co-defendant L. J. Mitchell was used by Glaze to transport heroin. Morris claims that at the time of this event he was in prison and that although he was indeed on furlough and was present during the transaction, he did not have custody of the car which he had loaned to Solon Glaze. Morris argues that the only way he could bring this information before the jury was to testify in his own behalf and thereby disclose the fact of his incarceration. (Tr. 5526-29, 5539-5545).

Morris' offer of proof, however, was hardly a defense. Morris insisted that since he was in prison between July, 1973 and July, 1974, he had no control over his car on April 19, 1974, the day in question. But even according to Morris' offer of proof, Morris was on furlough from prison on April 19, 1974, and on several other days as

* As to the "old law" convictions, Brown's testimony more than sufficiently established both Hightower's and Foster's involvement prior to May 1, 1971.

well. Morris' incarceration was completely consistent with the Government's proof with respect to this transaction, which was offered to corroborate the existence of a relationship in drugs among co-conspirators Mitchell, Glaze and Morris. Moreover, the issue was not whether or not Morris would testify, but whether a witness was available who could testify that in July, 1973 Morris "left" New York and gave his car to Glaze. Counsel to Morris expressly told the court that there was such a witness, Marion Ladd, whom he asked the court's permission to recall if necessary. (Tr. 5542-43). Although the court agreed, Morris never recalled the witness.

5. Reading To Jury During its Deliberations of Direct Testimony in Connection With Cowpers' February, 1973 Cocaine Purchase from Brown

Cowpers claims the court erred when, in response to a request from the jury on the sixth day of its deliberations for "testimony regarding February, '73 transactions involving Cowpers," he ordered that one and one-half pages of Brown's direct testimony and none of counsel's cross-examination of Brown be read to the jury. (Tr. 9381; Court Exhibit 59).

After receipt of the note, Government and defense counsel conferred and agreed upon the portion of direct testimony to be read to the jury. Disagreement surfaced, however, with respect to relevant portions of the cross-examination, whereupon defense counsel withdrew his prior agreement. The matter was then placed before the judge for resolution. Although the prosecutor was willing to consent to certain arguably relevant portions, counsel for Cowpers requested that wholly non-responsive portions of Brown's cross-examination be read, and specifically requested that the cross-examination testimony deemed arguably responsive by the Government *not be read*. When the court inquired whether the portions Cowpers wished read related to the "February, 1973 transaction" counsel

frankly admitted they did not, but urged that the jury was entitled to the "entire picture." (Tr. 9383-88). After considering the matter the district judge declined to read the entire testimony and ordered the limited direct testimony on this issue read to the jury.

To have responded to the jury's specific note as Cowpers suggested, six days into the deliberations, would have opened the door to retrying the entire case, regardless of what the jury wanted. The jury had observed some seven days of cross-examination of Brown, both general and particular, and already had before it the "entire picture." What the jury asked for was clarification of one particular, not re-presentation of an "entire picture," and the court's response was fully responsive to the jury's request. Since the court followed the proper procedure by consulting with counsel for both sides on the proper submission to the jury, *United States v. Shor*, 418 F.2d 26, 31 (2d Cir. 1969), and defense counsel conceded that his requested submission did not relate directly to the jury's request, the court did not err in refusing to have read to the jury material in addition to that which was sought. *United States v. Gentile*, 525 F.2d 252, 260-61 (2d Cir. 1975).

6. Testimony Concerning 1970 Arrest of Tommy Davis

Davis argues that testimony and evidence concerning an arrest and seizure of 175 bags of heroin from him in November, 1970, although otherwise admissible,* was more prejudicial than probative and, therefore, improperly received. The claim is meritless.

According to Brown, Davis told him in late 1970 that he had been recently arrested with heroin bought from Brown. (Tr. 1215-1220). The testimony concerning Davis'

* An evidentiary hearing on Davis' motion to suppress this evidence was held on July 21, 1976 after which the motion was denied.

arrest with Brown's heroin was therefore admissible as direct evidence of the charges in the indictment. If this testimony was prejudicial, it was only because it proved the crime charged in the indictment and not for any improper reason. *United States v. Taylor, supra*, slip op. at 2824; *Cf. United States v. Bermudez*, 526 F.2d 89, 95-96 (2d Cir. 1975), *cert. denied*, 425 U.S. 970 (1976). *United States v. Calvert*, 523 F.2d 895, 907 (8th Cir. 1975).

Davis suggests that when the witness, Sgt. Pepe, testified that he arrested Davis pursuant to a warrant the Government introduced a "mystery of . . . unexplained lawlessness," thereby prejudicing him. (Br. at 15). There was, however, no suggestion that the warrant was for anything other than for possession of the 175 bags of heroin with which he was found.

Davis also argues that the jury indirectly learned from the testimony that he had not only been arrested, but also convicted. He claims this inference flowed from a confluence of Sgt. Pepe's wholly innocuous statement that after he retrieved the 175 bags of heroin from Davis' person and his car he took Davis to his office and "processed" him, and from Brown's testimony that Davis told him he had been "busted," and "arrested and charged with possession of narcotics." (Tr. 5600, 1215, 1219).

This testimony, however, merely indicated that Davis had been arrested and charged, hardly a surprising fact since the testimony came from a police officer about finding Davis with heroin. Moreover, throughout the trial, from the first instructions to the last, the jury was carefully told by court and counsel that charges were not evidence of anything. See *e.g.*, Tr. 505. The jury could not have inferred, prior to counsel's cross-examination of Sgt. Pepe, anything whatever concerning the disposition of the 1970 case against Davis.

In any event, the matter is rendered wholly speculative, and the claim here wholly specious, by the fact that it was Davis himself who placed the fact of his conviction explicitly before the jury by eliciting from Sgt. Pepe the information that Davis had pleaded guilty to those charges, and had served time in prison thereafter. (Tr. 5625-27). This was a tactical decision, designed quite obviously to evoke the jury's sympathetic view that Davis had already suffered enough for the crimes charged in this indictment. The attempt to characterize this as the Government's error is preposterous.*

Finally, Davis claims error in the court's refusal to charge the jury that if it did not find that Brown was the source of the 175 bags of heroin, the jury should disregard altogether the evidence pertaining to that heroin. Since the requested charge was incorrect as a matter of law, it was properly denied. *United States v. Lam Lek Chong, supra*, 544 F.2d at 68; *United States v. Leonard*, 524 F.2d 1076, 1084 (2d Cir. 1975), *cert. denied*, 425 U.S. 958 (1976).**

7. Brown's Grand Jury Testimony Concerning Davis' Drug Transactions

Davis claims error in the Government's offering in evidence during redirect examination of Brown grand

* In a similarly misleading vein, counsel argues that the suggestion that Davis had been convicted was "at least equal in prejudice to the introduction of appellant's 'mug shot.'" This claim, too, must be attributed to fantasy since no photograph of Davis was offered in evidence.

** If the jury believed Brown that he was the source of the heroin, Davis' possession of the heroin was an act in furtherance of the conspiracy and clearly admissible; if the jury disbelieved Brown, Davis' possession of the heroin was admissible as a similar act committed contemporaneous to the period of the conspiracy and relevant to show his motive, intent and common scheme. See, *United States v. Taylor, supra*, slip op. at 2824; *United States v. Bermudez, supra*, at 95-96; *United States v. Tramunti, supra*, 513 F.2d at 1116, and the court properly so charged the jury. (Tr. 9112-13).

jury testimony relating to a sale of cocaine to Davis by Brown in November, 1971. Davis argues there was no permissible basis for the introduction of the testimony, that it was prejudicial, and that the prejudice was compounded by references to counsel by name which impermissibly interjected "personal credibilities" into the jury's consideration. These claims are frivolous.

On direct examination, Brown testified he had sold an eighth or quarter kilogram of cocaine to Davis at his son's last birthday party which Brown recalled as having been held on November 24 or 25, 1971. (Tr. 1221). On cross-examination, Davis sought to impeach Brown by showing that on a prior occasion Brown had referred to a "meeting" with Davis occurring between the date of his son's birthday and his death in January, 1972. Brown testified that he remembered making no such statement but when confronted with allegedly inconsistent grand jury testimony he agreed that he had. Thereafter, Davis explored Brown's use of cocaine and its effect on Brown's ability to remember. (Tr. 2307-2310).

From this exchange on cross-examination the jury was left with the impression that Brown had testified at trial in a fashion inconsistent with his earlier statements or testimony. From this inconsistency Davis sought to establish a foundation for his later argument in summation, that all Brown's testimony concerning Davis was fabricated, and that Brown had "hoodwinked" the Assistant United States Attorney who was "over-zealous" in his prosecution of Davis. (Tr. 8157-58, 8162).

The jury was entitled to evaluate this claimed inconsistency in context. When the grand jury testimony about the "meeting" to which defense counsel had referred was put before the jury, it became clear that in all essential respects Brown's testimony in the grand jury

about the sale of cocaine to Davis in late 1971 was consistent with his testimony at trial. The inconsistency, if it was such, was that in the grand jury Brown said that the sale had taken place at some point in time between his son's birthday and his death, while at trial Brown said the sale took place on the day or evening of the party. In the context of the entire testimony about this event, the significance of the discrepancy concerning dates fades, a significance the jury was entitled to evaluate for itself. *United States v. Lombardi*, 550 F.2d 827, 828-29 (2d Cir. 1977).

Finally, Davis claims the prosecutor put his own credibility in issue by eliciting from Brown in redirect examination the fact that he had questioned Brown in the grand jury with respect to the Davis transactions, and by prefacing questions to the witness, as he moved along in redirect from one defendant to the next, by saying, for example, "Mr. Brown, you recall that [counsel for Davis] questioned you concerning your testimony in the Grand Jury with respect to Thomas Davis, do you recall that?" (Tr. 2687). As to the latter issue, since the Government's redirect responded to seven days of cross-examination of Brown by twenty-two defense attorneys, a limited focusing on the questioning as it moved from topic to topic was required, and was not in any way improper. This was the trial court's view as well. (Tr. 2696-98).*

* Davis' objection to this kind of clarification was certainly at odds with the stated concern for the supposed difficulty the jury might have in following the evidence. Indeed, at one point the Government asked that each defense attorney, at the commencement of cross-examination, identify himself and his client. Some counsel objected. Thereafter, some identified themselves, some themselves and their clients and some neither. The Court took note of the apparent inconsistency between counsels' professed concern on the one hand and this practice, on the other. (Tr. 1862, 1875).

The witness' testimony that it was the trial prosecutor who also questioned him in the grand jury was totally innocuous in the context of the questions complained of and, in fact, was never the basis of an objection. (Tr. 2689-90). Indeed, it had been brought out in direct examination as impeaching material, *United States v. Del Purgatorio*, 411 F.2d 84, 87 (2d Cir. 1969), without defense objection, that the trial prosecutor had met and prepared the witness as early as October, 1975. (Tr. 987-88). Furthermore, it was another defense counsel who first explicitly brought out the fact that the prosecutor had questioned Brown in the grand jury without objection. (Tr. 2472-73). Moreover, in the context of this case, in which the Government's credibility was repeatedly put in issue by defense counsel, there was no prejudice.*

* During cross-examination, and in their summations, counsel attacked Brown's credibility in the most vicious terms. Some suggested Brown was lying for reasons of his own. Others, however, including Davis, argued that the witnesses had been prompted, that the prosecutors were "overzealous," that agents had an interest in the outcome of the case, and that the prosecutor had been "hoodwinked." Accordingly, it was defense counsel, in their search for an explanation of the consistent testimony of the witnesses, who challenged the ethics of the prosecutors and the Government. In response, the Government argued that in Brown's case only one person, the prosecutor at trial, had spoken to him and reviewed his testimony between October, 1975 and the trial. Counsel to Davis, and others who took the view that the prosecutor was "overzealous" and was "hoodwinked" by Brown, invited the response that the prosecutor had not just stepped into the case shortly before trial, but had worked with Brown for at least a year and was not likely to have been taken in. Moreover, before making the argument that the jury should acquit if they believed that words were put into the mouths of the witnesses, the jury had a right to know that it was the credibility of the prosecutor whom they had observed for fourteen weeks that had been put in issue, and not that of some faceless official. *United States v. Tramunti*, *supra*, 513 F.2d at 1118-19. Since it was Davis along with co-counsel who interjected "personalities" into the trial, not the prosecutor, Davis should not now be heard to complain that the Government had a basis in the record with which to counter his improper arguments.

8. Evidence Seized from the Home of Joseph and Lois Sampson in 1974 and 1976 was Properly Received in Evidence

Joseph and Lois Sampson contend that two separate searches—respectively in 1974 and 1976—made of different apartments rented by them violated their Fourth Amendment rights and that the introduction of certain items of evidence seized during those searches requires reversal. Both searches, conducted pursuant to warrant,* were proper. Accordingly, these claims are meritless.**

A. The 1974 Search

Sampson claims there was an insufficient showing of probable cause to justify issuance of the warrant and that the information on which it was based was stale. There was, however, more than ample probable cause recited in paragraphs 7 through 14 of the affidavit to justify issu-

* It is worth noting at the outset that affidavits in support of a search warrant are not to be read in a "grudging or overly technical manner," *United States v. Ventresca*, 380 U.S. 102, 108 (1965), and any doubt should be resolved in favor of upholding the search warrant. *Id.*, at 106. Since warrants are preferred it is salutary to assure law enforcement officers that when a warrant is obtained in a close case it will be upheld, *United States v. Lewis*, 392 F.2d 377, 379 (2d Cir.), *cert. denied*, 393 U.S. 891 (1968); *In re Desist*, 384 F.2d 889, 897 (2d Cir. 1967), *aff'd*, 394 U.S. 244 (1969).

** The Sampsons' claims with respect to the 1974 seizure raised no factual issue and were denied by the district judge on papers. A hearing on the Sampson's motion to suppress the 1976 seizure was conducted on July 7, 1976. The district judge denied the motion at the conclusion of the hearing.

ance of the warrant on July 24, 1974.* The affidavit establishes that in June, 1974 a confidential informant of proven reliability advised Officer Ricucci (the affiant) that the Sampsons' son ** was dealing L.S.D. and marijuana from the apartment in question; that the informant had purchased what proved to be L.S.D. from the Sampsons' son and that he knew of a large quantity of marijuana in the Sampsons' apartment; that between July 1 and July 23, 1974 the informant observed a marijuana plant on the balcony of the apartment; that on July 23, 1974, an experienced police officer who had observed more than 1,000 marijuana plants in the past observed a marijuana plant on the Sampsons' terrace; and that on July 23, 1974, the informant stated there was a small amount of marijuana and LSD inside the apartment. (S. App. 8-10).

An affidavit based on an informant's statements showing probable cause supports the issuance of a search warrant if (1) it sets out "some of the circumstances forming the basis of the informant's conclusion that there is illegal activity or evidence thereof on the premises" and (2) if it states "facts which give some assurance that the informant is a credible person." *United States v. Karathanos*, 531 F.2d 26, 29 (2d Cir. 1976), citing *Spinelli v. United States*, 393 U.S. 410 (1969) and *Aguilar v. Texas*, 378 U.S. 108 (1964); see, *Mapp v.*

* Sampson alleges that paragraphs two through six of the affidavit recite information obtained by way of an illegal search. Since the existence of probable cause in the affidavit is so clear, the Government here, as it did below, consents to the Court's evaluating probable cause without reference to those paragraphs. *James v. United States*, 418 F.2d 1150, 1151-52 (D.C. Cir. 1969); *United States v. Sterling*, 369 F.2d 799, 802 (3d Cir. 1966); *Chin Kay v. United States*, 311 F.2d 317 (9th Cir. 1962); *Clay v. United States*, 246 F.2d 298 (5th Cir.), cert. denied, 355 U.S. 863 (1957); *United States v. Epstein*, 240 F. Supp. 80 (S.D.N.Y. 1965) (Weinfeld, J.).

** The Sampsons' son, Ray Sampson, was living with them in the apartment in question at the time.

Warden, 531 F.2d 1167, 1170 (2d Cir. 1976). The Sampsons concede that both prongs of this two-part test were met in this case.

Since the informant was reliable, there was more than sufficient probable cause to issue the warrant. Search warrants have been issued and upheld on far less support. See *Mapp v. Warden*, *supra*, 531 F.2d at 1171 (2d Cir. 1976); *United States v. Pond*, 523 F.2d 210, 211-214 (2d Cir. 1975); *United States v. Rollins*, 522 F.2d 160, 163-65 (2d Cir. 1975). Here the court was presented with reliable information establishing that narcotic drugs were present in the apartment *one day* prior to the issuance of the warrant. Given the fact that the information supporting the warrant was current to July 23, 1974, Sampson's claim of staleness is frivolous. Moreover, there is no evidence to support the claim that the issuing judge discredited the information provided in the affidavit with respect to the possession and sale of L.S.D. Whether omission of the term L.S.D. from the warrant was inadvertent or deliberate, it is clear that the highly persuasive reference to L.S.D. in the affidavit contributed to the Maryland District Court's decision that there was, aside from any probable cause to search for L.S.D., probable cause to search for "marijuana" and related material and equipment.*

Sampson's half-hearted attack on the scope of the search also must fail. The warrant clearly and properly permitted the search of the entire apartment. There is no indication that the Sampsons' son's living area in the apartment was in any way limited to one particular

* In addition, the omission of the term L.S.D. from the warrant was immaterial if the judge and officers all understood it was intended to be part of the warrant. See *United States v. Christopher*, 546 F.2d 496 (2d Cir. 1976). The affidavit makes plain that this was their understanding.

part of the apartment. Thus, the agents and officers were clearly within their rights in searching the whole apartment. *United States v. Canestri*, 518 F.2d 269, 274 (2d Cir. 1975).

Given the authorization to search, the officers were justified in their presence in the apartment and free to search for the items noted in the warrant as well as to seize other contraband or evidence in plain view. *Coolidge v. New Hampshire*, 403 U.S. 443, 446-73 (1971); *Warden v. Hayden*, 387 U.S. 294 (1967); *United States v. Pacelli*, 470 F.2d 67, 70-71 (2d Cir. 1972), *cert. denied*, 410 U.S. 983 (1973); *United States v. Canestri*, *supra*; *United States v. Morrell*, 524 F.2d 550, 555 (2d Cir. 1975); *United States v. Montiell*, *supra*, 526 F.2d at 1010.

The district judge properly concluded, that the warrant was valid and that the 1974 search was lawfully conducted incident to it. Certain documents seized during the search were therefore admissible at trial.*

B. The 1976 Search

Joseph and Lois Sampson challenge the validity of a search of their apartment on April 21, 1976, pursuant to a warrant and the admission at trial of documentary evidence seized at that time. These claims, not effectively raised below and therefore improperly raised here are, in any event, without merit.

(1) The Suppression Hearing

On the morning of April 21, 1976, federal and local law enforcement agents arrested Lois Sampson at her

* Although narcotics and paraphernalia were seized during this search, the Government offered in evidence only documents showing association between the Sampsons and other co-conspirators. (GX 44A-L).

apartment in Maryland on a bench warrant issued by the United States District Court for the Southern District of New York on the indictment in this case. Some time thereafter Joseph Sampson was arrested on a similar warrant upon his arrival at the apartment. Between the two arrests the agents secured a search warrant from a Maryland district judge which led to the search and seizure complained of here.

Prior to trial, Joseph Sampson moved to suppress evidence seized from the apartment on April 21, 1976, raising a factual issue requiring a hearing, which was held on July 7, 1976. Sampson's papers submitted on the motion raised a single and simple point: he claimed that the agents conducted a full-scale search of his home and only thereafter, as a subsequent justification, obtained a warrant. (H. Tr. 2-3). On the morning of the hearing, Lois Sampson joined in the application based on the papers submitted by her husband. (H. Tr. 3).

Three of the officers present at the arrest and subsequent search testified at the hearing. In essence, they testified that Lois Sampson was arrested in her apartment at approximately 7:45 A.M. on April 21, 1976. While DEA Agent Atlee advised Mrs. Sampson of her rights, Maryland Investigator Gheen entered a bedroom in the apartment looking for Joseph Sampson, for whom he also had a warrant of arrest. In the bedroom Gheen observed "a small quantity of marijuana in plain view, which was in a smoking pipe, like on an end-table which was on the righthand side of the bed." (H. Tr. 74). Gheen seized the contraband and advised Atlee he would seek a search warrant for the apartment. Atlee remained at the apartment, waiting for Joseph Sampson and for word concerning the warrant. At his office, Gheen

performed a field test on the material he had taken which registered positive for marijuana. (H. Tr. 76, 79). Thereafter Gheen drafted an affidavit in support of a search warrant, had it approved by the State's attorney and presented it to a district judge who issued the warrant. Subsequently, Gheen returned to the apartment with the warrant and presented it to Joseph Sampson who, in the intervening time, had returned home and been arrested. A search pursuant to the warrant then was conducted. (H. Tr. 74-78). Joseph Sampson also testified at the hearing, and even he initially stated that the search conducted by the agents occurred after the warrant had been issued, although some judicious questioning by his attorney elicited a different response. (H. Tr. 102-03). Based on the record, the district judge decided the issue before him and denied the motion to suppress. (H. Tr. 136-37).

(2) The District Court properly denied the motion to suppress evidence seized in this search

The single issue that was properly raised in the District Court is pressed by neither defendant in this Court. Instead, they turn to other alleged deficiencies in the search warrant. Lois Sampson seems to argue that Investigator Gheen roamed too far in looking for Joseph Sampson and that he was improperly in the bedroom when he observed the marijuana and pipe. Since this claim was not raised below, she is foreclosed from raising it on appeal. *United States v. DiStefano*, Dkt. No. 76-1581, 1582, slip op. 3539, 3547, 3548, n.5 (2d Cir. May 16, 1977); *United States v. Braunig*, Dkt. No. 76-1448, slip op. 2773 (2d Cir., April 11, 1977); *United States v. Schwartz*, 535 F.2d 160, 163 (2d Cir. 1976); *United States v. Rollins*, 522 F.2d 160, 165 (2d Cir. 1975). Moreover, similar conduct by agents seeking to locate a

person for whom they have an arrest warrant has been approved. See, *e.g.*, *United States v. Montiehl*, 526 F.2d 1008, 1010 (2d Cir. 1975).

Joseph Sampson urges the claim that Investigator Gheen had no basis to seize the marijuana and pipe when he saw it in the Sampsons' bedroom. Although the reasonableness of Gheen's seizure of the pipe was not properly before the district judge since the defendant had moved for suppression on totally different grounds, Sampson nonetheless argued at the close of the hearing that the record showed Gheen had no basis for his belief that the pipe contained marijuana. Therefore, he contended that the seizure of the pipe, and *a fortiori* the warrant itself, were improper. The district judge denied Sampson's claim saying:

"I am prepared to find on this record that there was probable cause for this officer to pick up this pipe as a marijuana pipe containing marijuana residue and taking it away and thereafter be confirmed in his finding that it, in fact, contained marijuana." (H. Tr. 134).

Judge Owen's finding was plainly supported by the record. Sampson's argument in this Court that it "is uncontested from the hearing . . . that Agent Gheen saw a pipe with ashes in it and seized it without probable cause only on the assumption it was marijuana," (Br. 28), is simply belied by the hearing record. What is clear from the hearing minutes is that Sampson intentionally shied away from this area, hoping to lure both the district judge and the Government into possible error. Thus, it is interesting to examine precisely what the record contains on this question, strategically bypassed by the defendant and his counsel in the District Court.

Gheen's affidavit noted that he observed "a marihuana smoking pipe with suspected marihuana, *and* marihuana

residue contained inside the bowl of the pipe. . . . (S. App. 17; emphasis added). Gheen's testimony at the hearing related that he "observed a small quantity of marihuana in plain view, which was in a smoking pipe. . . ." (H. Tr. 74). Sampson's cross-examination on this point, however, totally avoided what it was that Gheen saw, or what was in his mind at the time he examined the pipe. Instead of questioning in that area, Sampson asked only whether Gheen had performed his field test on scrapings from the pipe bowl *back at his office*, to which Gheen responded that there was indeed a residue. (H. Tr. 79).

Sampson suggests that Gheen could not recognize the items he saw as marijauana. This is mere speculation for the *record* is otherwise: Gheen's uncontradicted testimony was that he saw marijuana, and a marijuana pipe upon entering the bedroom. Moreover, the substance was in fact marijuana as his field test and subsequent analysis revealed. Thus, even if Sampson was permitted to raise in mid-hearing an issue not previously noticed to the Court or the Government, it was defendant's burden and obligation to place facts in the record which put the Government to the burden of proving the validity of the search incident to a warrant. See, e.g., *United States v. Bennett*, 409 F.2d 888, 898-99 (2d Cir.), *cert. denied sub nom. Haywood v. United States*, 396 U.S. 852 (1969), where this Court held that the defendant was precluded from raising an issue of impermissible suggestive identification for failure to develop the relevant facts, although there was nothing to prevent making an adequate record. Rather than undertake such a factual attack, Sampson did no more than to purposefully avoid the issue and nevertheless argue an inference that simply did not flow from the hearing testimony. Defendant having failed to make a proper or sound attack on the warrant, the district judge was left with the record before him which

left unchallenged Gheen's direct testimony that he, an experienced narcotics investigator (SA. 14), saw marijuana and a marijuana pipe in the Sampsons' bedroom. Crediting that testimony as Judge Owen clearly did, it follows that the agent was permitted to seize the pipe and marijuana as contraband in plain view, that the warrant thereafter issued upon such a basis was lawful, and that the few documentary items seized during the search were properly admitted at trial.*

POINT III

Appellants' Other Claims of Error Are Without Merit.

1. The Court Properly Exercised its Discretion in Removing A Juror Without A Hearing

Mitchell urges reversal of his conviction because the district judge excused a juror without giving all counsel an opportunity to be heard. The claim is meritless.

On September 20, 1976, approximately seven weeks after the start of trial, Government counsel was informed by counsel for one of the defendants that a juror had sought to contact a defendant. In view of related mat-

* Although the search resulted in a seizure of two packages of marijuana, a straw snorter with cocaine traces and a bag with traces of a cutting agent, the Government offered in evidence at trial only seven documents seized at that time: a condolence card from Brown to Hightower, care-of the Sampsons (GX 45A); five airplane and bus receipts for travel between Washington and New York (GX 45B); a scrap of paper with the name "Spanish Mikie" (GX 45C); a card with the phone number of Jody Brown (GX 45D); a photo of Jack Brown with a baby (GX 45E); a business card with the name of William Hightower (GX 45F); and a Christmas card from Jack Brown (GX 45G).

ters disclosed at that time concerning conversations and actions of certain defendants at the start of trial, a strong suggestion appeared that the juror had been corrupted. The matter was immediately brought to the district judge's attention. Judge Owen interviewed the sister of one of the defendants, who had been approached by the juror, and thereafter interviewed the juror in the presence of Government counsel and the defense attorney who had brought the matter to the court's attention. The juror was excused. (Tr. 4181-4193).*

Thereafter, the District Court immediately advised all defense counsel of the juror's discharge and the basis for it. The court determined that it would *voir dire* each of the other jurors and solicited suggestions from counsel on the best manner in which to proceed. Having done so, the court then examined the other jurors, found no taint and the trial proceeded to its conclusion. (Tr. 4194-4235).

The facts presented to the District Court indicated at least a contact between a juror and a defendant's relative in violation of the court's instructions, and possibly even a course of criminal conduct involving jury tampering. To preserve the impartiality of the jury as a whole the trial court had no alternative but to discharge the juror. To have delayed removal of the juror after the court interviewed him certainly might have led to a taint of the whole jury, thereby forcing a mistrial. Indeed, in a related context in which this matter has already come before this Court, the district judge's

* These proceedings were sealed by order of the judge and remain under seal at this time. A rather extensive account of the background of this matter appears, however, in *In the Matter of a Grand Jury Subpoena Served upon David Doe*, Dkt. Nos. 77-1047, 1059, slip op. 2403. (2d Cir. March 17, 1977).

actions were approved with the comment: "Suffice it to say that [the juror's] responses [to the court's questioning] fully justified the trial judge's discharge of [the juror] from the jury and the designation of an alternate to take his place." *In the Matter of A Grand Jury Subpoena Served Upon David Doe, supra*, slip op. at 2407.

A district judge has substantial discretion in an area such as this one. As this Court has stated:

"The court is authorized, pursuant to Fed. R. Crim. P. 24(c), any time before the jury retires to consider its verdict, to replace jurors with alternates if the court finds that jurors are 'unable or disqualified to perform their duties.' This substitution of an alternate juror for reasonable cause is the prerogative of the court and does not require the consent of any party. *United States v. Ellenbogen*, 365 F.2d 982, 989 (2d Cir. 1966), *cert. denied*, 386 U.S. 923 (1967). A juror may be discharged for misleading the court or when facts are presented which convince the court that a juror's ability to perform his duty has become impaired."

United States v. Floyd, 496 F.2d 982, 990 (2d Cir.), *cert. denied*, 419 U.S. 1069 (1974). Furthermore, "a trial judge's handling of alleged juror misconduct or bias is only reviewable for abuse of discretion." *United States v. Panebianco*, 543 F.2d 447, 457 (2d Cir. 1976).

Here, the integrity of the trial was at stake and decisive action by the judge was required. "Situations may sometimes arise . . . [that] will require the judge to take immediate action without consulting counsel." *United States v. Houlihan*, 332 F.2d 8, 13 (2d Cir.), *cert. denied*, 379 U.S. 859 (1964). Plainly, this was such a case. Under the circumstances, it was more than sufficient that the District Court acted with only one defense counsel present; see also *United States v. Cameron*, 464 F.2d 333, 334 (3d Cir. 1972).

2. Mitchell Was Not Denied Effective Assistance of Counsel

Mitchell also contends he was denied effective assistance of counsel because his trial attorney suffered an injury to his hand at an early point in the trial, was absent undergoing surgery on his finger during one day of the proceedings and, according to Mitchell, was "wracked with pain" and "must have been unable to concentrate" during the remainder of the proceedings.* Mitchell argues that his consent to be represented by another attorney while his trial counsel was hospitalized briefly is invalid because it was not knowingly and intelligently made.

Mitchell's claim is wholly unfounded. At no time during trial did Mitchell's counsel suggest that he was unable to perform his functions at trial. Mitchell does not cite even one specific instance where counsel's representation could have been in any way criticized or improved upon, nor does he point to any reference to Mitchell during his attorney's brief absence, or any other arguable instance of specific prejudice arising from his representation at trial.

On September 1, 1976, at the start of that day's proceedings, the court was advised by co-counsel that Mitchell's attorney had been hospitalized the night before for surgery on his finger. (Tr. 2376-77). Mitchell's counsel had cross-examined Brown the previous day, the fifteenth

* Mitchell relies upon a letter, dated January 15, 1977, written by his trial counsel to Chief Judge Kaufman requesting to be relieved as counsel on appeal. Fairly read in context, trial counsel in this letter simply said that at the age of 73 the accident and his involvement in the trial had earned him a vacation which the appeal would preclude.

attorney to do so, and five defendants had yet to take their turn. (Tr. 2322-49). Since Mitchell's name would not be mentioned during the entire day it was agreed to proceed. Mitchell agreed to have the trial go forward and to have co-counsel represent him for the day, a consent which he renewed at the luncheon recess. (Tr. 2378-79, 2461-63). Indeed, Mitchell himself asked permission to absent himself from the day's proceedings but the court declined to allow him to do so. The court instructed covering counsel to review the minutes of the day's proceedings with Mitchell and trial counsel upon his return. (Tr. 2379).

There was no prejudice to Mitchell in proceeding since his name was not mentioned during his attorney's absence.* Moreover, Mitchell's waiver was knowing: he had been sitting through the trial for three weeks and had full understanding of the proceedings. Indeed, on a prior occasion he had consented to his attorney's absence for a brief period and was represented by the same co-counsel. (Tr. 416).

Since "assistance of counsel will not be deemed inadequate as a matter of constitutional law unless it 'was such as to make the trial a farce and a mockery of justice. . . .' *United States v. Wight*, 176 F.2d 376, 379 (2d Cir. 1949), *cert. denied*, 338 U.S. 950 (1950)." *United States v. Taylor*, *supra*, slip op. at 2829; *see also Rickenbacker v. Warden*, 550 F.2d 62, 65 (2d Cir. 1976),

* Mitchell does not note in this appeal how long his attorney was absent and the record, unfortunately, does not note his return. Trial counsel's CJA voucher, attached as part of the Government's Appendix, shows him present in court on September 1, 1976 (G. App. 21), a fact we represent is consistent with the prosecutor's recollection of events at trial. The next reference to trial counsel in the record appears on September 3, 1976 voicing an objection. (Tr. 2759).

a defendant making such a claim assumes the burden of showing prejudice and at least articulating some actual—not speculative—defect in the representation he received. Mitchell's failure to do so renders his claim meritless. *United States v. Joyce*, 542 F.2d 158, 160 (2d Cir. 1976); *United States v. Simone*, 205 F.2d 480, 483 (2d Cir. 1953); *Henderson v. United States*, 419 F.2d 1277, 1278 (5th Cir. 1970).

In fact, Mitchell's trial counsel performed his functions with great skill. He elicited from Brown and Parker on cross-examination the largely social nature of Brown's and Mitchell's relationship (Tr. 2322-2349, 4099-4117); he cross-examined a chemist who analyzed the results of a vacuum search of Mitchell's home and established the miniscule quantity of cocaine retrieved (Tr. 5271-5288, 5295-5309); he overlooked no opportunity to confront a witness with past inconsistencies or to establish inferences favorable to his claim, and to sum up with characteristic charm and force. (Tr. 8028-8048). Far from being ineffective, trial counsel consistently displayed the skills acquired in years of practice in this court, unimpaired by whatever accident he had suffered.*

* Moreover, had Mitchell's experienced trial counsel believed that his accident impaired an effective representation of his client, he surely would have sought a mistrial, which he did not do. This, therefore, is not a case like *United States v. Tramunti*, *supra*, where the death of a defendant's attorney in mid-trial necessitated the appointment of a new attorney who, without a continuance, could not have been expected effectively to gauge and protect his client's interests, 513 F.2d at 1116-18. Here, trial counsel resumed his tasks immediately upon his return to court, without significant interruption.

3. The Court Did Not Abuse Its Discretion In Denying Criminal Justice Act Funds For A Psychiatrist's Evaluation Of Jack Brown's Testimony

Joseph Sampson complains that the district judge abused his conceded discretion by denying the expenditure of Criminal Justice Act ("CJA") funds to permit a psychiatrist to study the transcript of Brown's testimony and, based upon those documents, to offer an expert opinion concerning his credibility. An examination of the trial judge's careful consideration of this request demonstrates that in the circumstances of this case the District Court acted wisely and properly.

During Brown's extensive seven days of cross-examination he was questioned about numerous situations involving alleged "paranoia," drug abuse, and other aberrations relating to his supposed motive to testify, a theme that had been struck as early as the first opening for the defense. (Tr. 557-63). Part of the cross-examination related to a two-page letter written by Brown to the FBI, prior to his surrender, in which he claimed that certain of his associates were trying to kill him. Portions of the letter, with certain names omitted, were read to the jury. (GX 3505 W; Tr. 2230-35).

Some time thereafter, appointed counsel for Joseph Sampson asked the court, *ex parte*, to authorize funds for a psychiatrist to evaluate the letter from a clinical point of view. The District Court, in its discretion, approved the payment, and the letter was submitted to Dr. Harvey Greenberg for study.

Thereafter, Dr. Greenberg's report, in the form of a letter dated September 13, 1976, was submitted to the court by counsel. Sampson's counsel then made a fur-

ther application for authorization of yet additional CJA funds to retain a psychiatrist to read Brown's trial testimony, perhaps consider other information, and thereafter reach a judgment which might form the basis of an offer of proof. (Tr. 4009-4013).^{*} Judge Owen carefully considered the Greenberg letter overnight and denied the authorization of additional funds for a psychiatric exploration of Brown's character and willingness to lie. (Tr. 4050).

This issue was firmly committed to the discretion of the district judge, *Hamling v. United States*, 418 U.S. 87, 108 (1974), and that determination may not be overturned unless it was manifestly erroneous. *United States v. Pacelli*, 521 F.2d 135, 140 (2d Cir. 1975); *United States v. Barnard*, 490 F.2d 907, 912 (9th Cir. 1973), *cert. denied*, 416 U.S. 959 (1974); *United States v. Butler*, 481 F.2d 531, 535 (D.C. Cir. 1973). The district judge's decision here was proper and should not be disturbed.

The trial court previously had exercised its discretion on this issue in favor of a preliminary psychiatric examination by authorizing payment to Dr. Greenberg to analyze Brown's "FBI letter." Even after that review, however, counsel was unwilling to come forward with an offer of proof; instead he wanted more studies at Govern-

^{*} From the colloquy at page 4009, it seems clear that defense counsel previously had spoken to the court on this second application, *ex parte*, as was evidently proper under Title 18, United States Code, Section 3006A(e)(1). Sampson has not furnished a copy of the transcript and the record does not disclose the date it occurred. The record, unfortunately, does not fully show the nature of the relief requested since counsel interrupted the court as it was about to state the request and characterized it as "extensive work" at CJA expense. (Tr. 4009). Thus, whether or not the request included the proposed review by the psychiatrist of Brown's voluminous 3500 material is not clear on the record.

ment expense to determine if the psychiatrist might develop something helpful to the defense. This was a "fishing expedition" of classic definition. Moreover, the court had already received a preview of the sort of testimony the psychiatrist was likely to give even after reviewing Brown's two-thousand pages of testimony and perhaps one thousand pages of 3500 material. Dr. Greenberg's preliminary assessment, virtually incomprehensible in some areas and typically on-the-one-hand-on-the-other-handish in others, concluded with the "compelling" observation that Brown's spelling of the word "victim" as "victum" betrayed a fear of homosexual rape. (SA. 4). It was hardly surprising, therefore, that the district judge preferred to bring such a tenuous and unjustifiable exploration to a close and to leave the issue of Brown's credibility to the jury.

The trial court's view that he did not consider the ultimate area a "profitable" one for the jury's consideration dramatically understated the chaos that psychiatric testimony would have produced if introduced at trial. As another court considering this issue has said:

"Credibility . . . is for the jury—the jury is the lie detector in the courtroom. Judges frequently instruct juries about factors that the jury may or should consider in weighing the veracity of a witness. In this respect it can be said that judges assume that they have certain expertise in the matter, and that juries have less of that expertise than judges. It is now suggested that psychiatrists and psychologists have more of this expertise than either judges or juries, and that their opinions can be of value to both judges and juries in determining the veracity of witnesses. Perhaps. The effect of receiving such testimony, however, may be two-fold: first, it may cause juries to surrender their own common sense in weighing

testimony; second, it may produce a trial within a trial on what is a collateral but still an important matter. For these reasons we, like other courts that have considered the matter, are unwilling to say that when such testimony is offered, the judge must admit it." *United States v. Barnard, supra*, 490 F.2d at 912-13.*

Moreover, the whole issue that counsel sought to raise was already before the jury in a simple, non-technical way and could be argued by counsel with full force. It was the defendant Sampson's position that Brown was fearful for his life, that he therefore sought the protection of the Government and that to eliminate the threat to himself he gave information to the Government leading to the indictment. Brown had already testified to all these facts. In addition, Brown testified that when it was in his interest to do so, he perjured himself under oath as, for example, when he lied at a suppression hearing as a defendant in a 1967 drug case which resulted in a dismissal of the charges. (Tr. 1084-87). The Government conceded, even urged on the jury, that Brown, therefore, had a powerful motive to testify at this trial. The critical issue for both sides and the jury, however, was whether Brown had a motive to testify *falsely*, or whether it was in his self-interest to tell the truth. (Tr. 8621-27). Psychiatric testimony of the kind contemplated by Sampson was totally irrelevant to this issue. As this Court has said elsewhere on a similar question "it is difficult to see how [a psychiatrist] could determine, based upon [Brown's] own testimony what [Brown's] self-interest might be at any particular time or place."

* Here, of course, there had not even been an offer of proof, only a request for extensive work possibly to be followed by a request that the psychiatrist testify "if his ultimate findings are favorable to defense." (Tr. 4009-10).

United States v. Pacelli, supra, 521 F.2d at 141. Cf. *United States v. Bright*, 517 F.2d 584, 586 (2d Cir. 1975).

Both the Government in its direct and re-direct examination, and defense counsel in seven days of cross-examination and one of re-cross, brought out Brown's eccentric behavior which would have been the basis of any psychiatrist's findings as to Brown's credibility. These included Brown's prolonged period of heroin addiction and cocaine use; his constant possession of weapons; his admission that he often saw things move and heard voices when under the influence of cocaine; his shooting through a door because he believed someone was after him; his pistol-whipping a car salesman for insulting a girl friend; his flushing three kilograms of cocaine down the toilet because he believed they had been poisoned; his belief that Michael Parker was a hired killer, and, indeed, his belief in the existence of laser beams able to see through concrete walls and put an image on a television set.* Because of this, and his own confessed role as an accomplice, the District Court instructed the jury that Brown's testimony was inherently suspect and should be considered with particular care. No more was required, *United States v. Pacelli, supra*, 521 F.2d at 140.

Moreover, here, as in other cases in which the matter has arisen, there was overwhelming extrinsic corroboration of Brown's testimony giving substantial assurance of

* On cross-examination Brown admitted that he had written about laser beams going through steel walls in his FBI letter, but that he had been talking about certain advanced weaponry called a starlight. (Tr. 1787-1791). Although the Government chose not to attempt to establish whether such a weapon—the Starlight scope—was part of our military arsenal, had the psychiatrist testified about this matter, the Government would then have been obliged to call a weapon's expert to testify on this issue. It is just such a collateral farce that the court's ruling foreclosed.

its reliability.* *United States v. Butler, supra*, 481 F.2d at 535. As the district judge observed in denying Sampson's request, Brown testified he had been told about the threat to his life while in Florida but defense counsel chose not to pursue the matter on cross-examination. During re-direct examination a taped conversation between Brown and a lawyer, Boggs, conducted shortly after Brown's surrender in April, 1975, was received in evidence in which Boggs, who was not privy to any information from the Government, told Brown he had heard independently the "contract" on Brown's life was for \$75,000. (Tr. 2873; GX 3505A at 57-59). This was ample corroboration that Brown's fear was not a paranoid delusion, as was suggested by defense counsel in cross-examination; see the District Court's ruling on this evidence at Tr. 2727. Furthermore, although during debriefings with the F.B.I. Brown had labeled Michael Parker, his son-in-law, as a murderer who had double-crossed him, nevertheless the incriminating narcotics information furnished to the Government by Brown about Parker was self-evidently true since Parker pleaded guilty to the indictment based upon Brown's accusations. The District Court was permitted to take these corroborative facts into account in ruling on Sampson's request. (Tr. 4051).

If the psychiatric inquiry proposed by Sampson was irrelevant to the proceedings below, it did not become more germane simply because counsel who suggested it

* Lois Sampson's suggestion that Brown was an incompetent witness is hardly even arguable. Indeed, when convenient to their cause, defendants freely argued that Brown was telling the truth. Brown's alleged inability to tell the truth did not prevent him from fully disclosing all of the impeaching details about his own life that defense counsel so strenuously urged the jury to believe; nor did it deter defendant O'dood's counsel from urging the jury to believe Brown when he said that O'dood never *directly* purchased drugs from Brown; nor did it impede counsel for Dunmore from asking the jury to believe Brown when he testified that Dunmore was an addict who purchased drugs from him for her own use.

was appointed under the Criminal Justice Act. The Act provides for the appointment of investigative or expert services where they are "necessary to an adequate defense." 18 U.S.C. § 3006(e)(1). In *United States v. Durant*, 545 F.2d 823, 827 (2d Cir. 1976), this Court adopted the construction of this statute enunciated in *United States v. Bass*, 477 F.2d 723, 725 (9th Cir. 1973), which holds that "the statute requires the district judge to authorize defense services when the defense attorney makes a timely request in circumstances in which a reasonable attorney would engage such services for a client having the independent financial means to pay for them." See also *United States v. Theriault*, 440 F.2d 713, 716 (5th Cir. 1971). The district judge here was sensitive to the strict requirements of law and, more significantly, to the principle of guaranteeing all defendants the fairest trial possible. It was in this spirit that the court approved the expenditure of CJA funds for an investigator to be shared by the "indigent" defendants,* and approved the initial psychiatric study by Dr. Greenberg. This was not a case such as *Durant*, *supra*, in which a defendant was confronted with expert testimony, obtained by the Government, crucial to the Government's case, and was prevented because of indigency from utilizing the services of an independent expert to analyze the data and rebut the Government's *expert* proof. Nor was this a case such as *Theriault*, *Bass* or *United States v. Schultz*, 431 F.2d 907, 911 (8th Cir. 1970) in which a defendant was foreclosed from offering possible exculpatory testimony as to an essential element of the offense—criminal intent or sanity. Here the inquiry was directed only in the most remote and collateral of fashions at the credibility of the Government's witness, a matter

* Joseph Sampson, Lois Sampson and William Hightower were all "indigent" for purposes of the assignment of counsel. It is not wholly without interest on this point that Hightower and Joseph Sampson were released before trial, respectively, on surety bonds, posted by bondsmen in the far from indigent amount of \$100,000, and Lois Sampson in the amount of \$25,000.

particularly suited to be explored in the time-tested crucible of cross-examination and ultimately committed to the good common sense of the jury—as it would have been even had both sides engaged in a parade of conflicting experts to testify to contradictory technical opinions of Brown's "credibility". Counsel's request was nothing more than the "fishing expedition" condemned in *United States v. Schultz*, *supra*, 431 F.2d at 911; see *United States v. Harris*, 542 F.2d 1283, 1314-16 (7th Cir. 1976), a judgment obviously concurred in by the seven retained attorneys who, by not themselves hiring a psychiatric expert, showed they, too, did not believe that the expense involved was reasonable, or that the return was likely to be at all helpful.*

4. The Court Properly Denied a Severance to Joseph Sampson and Lois Sampson

Joseph and Lois Sampson argue that they were entitled to a severance from each other and that the district judge's denial of their motion for a severance deprived them of a fair trial. Since neither defendant met the "difficult burden to show sufficient prejudice to warrant a severance" based upon something more than a simple assertion of different theories of the case, *United States v. DiGiovanni*, 544 F.2d 642, 644 (2d Cir. 1976); *United States v. Finkelstein*, 526 F.2d 517, 525 (2d Cir. 1975),

* Various defendants made a pre-trial request for disclosure of existing psychiatric records of Brown, which the District Court denied, without prejudice to be renewed at a later date. (A. 139-40). At trial Brown testified that he had never been psychiatrically examined. The Government recalls no motion for a psychiatric examination of Brown being made by any counsel during trial; nor for that matter, does the record reveal that any other counsel—whether retained or appointed—joined in Sampson's application for the first, or additional authorization for a psychiatrist, nor was any offer of proof made by any counsel with respect to proposed psychiatric testimony concerning Brown. The absence of such requests shows beyond question that defense counsel viewed the psychiatric matter as a fruitless diversion.

cert. denied, 425 U.S. 960 (1976), the District Court's denial of their respective motions was correct.

(a) Joseph Sampson

Joseph Sampson's claim rests upon the wholly fallacious premise that the evidence against him was sufficiently weak to make conceivable an argument that Lois Sampson was the narcotics trafficker in the family whereas he was an innocent "by-stander." The record is otherwise.* To be sure, Brown testified that Lois Sampson continued dealing with him in 1973, whereas Brown did not see Joseph Sampson after December, 1972, or at the latest January, 1973. But if Brown told the truth on that score, as Joseph Sampson insists, no reason has been advanced why Brown was not also truthful when he testified that Joseph Sampson began purchasing heroin and cocaine from him as early as 1967 as the partner of Roland "Rabbit" Brown, and that it was Joseph Sampson who initiated Lois Sampson into the narcotics traffic in 1968.** Similarly, Brown testified that Joseph Sampson, not Lois, knew of the financial arrangement between Brown and Frank Moten. Moreover, Sampson totally ignores the testimony of Michael Parker that he picked

* It can hardly go unnoticed that Joseph Sampson's insistence that the evidence against him was thin is totally inconsistent with Lois Sampson's complaint that she suffered because of the "spillover" of evidence from her husband.

** Brown testified that in 1968 Joseph Sampson asked if Lois could pick up drugs from Brown on occasion. This testimony was linked to related evidence showing how male drug dealers often used women to pick up drugs. Such was the pattern with James Laws, Solon Glaze and John Morris; as to the latter two, they used Marian Ladd, among others, for that purpose, advising her that courts were more lenient on women. From the proof it was clear that Joseph Sampson used his wife for the same purpose.

up drug money from Joseph Sampson in August, 1970 and delivered it to Brown; that Joseph Sampson bought cocaine from Brown at a steady clip; and that Parker saw Sampson at Brown's apartment at 180 West End Avenue, as many as twenty times between February, 1971 and July, 1972, at which times he bought and used cocaine. Accordingly, it is plain from the record that even at a separate trial counsel could not have plausibly argued to the jury the innocence of his client and the relative guilt of Lois Sampson without opening the door to a strong rebuttal argument by the Government and thereby forfeit any hope for a favorable verdict.*

Similarly Joseph Sampson's claim that he could have developed the testimony of Ann Reynolds to his advantage at a separate trial is illusory. It is far from clear that Reynolds would have testified at a separate trial of Joseph Sampson since, as he concedes, she gave no testimony about him at this trial. Had she testified, however, her testimony may very well have been less restricted than it was at this joint trial.** Indeed, at trial, as in

* Indeed, the record does not support the proposition that counsel was prevented from making this argument at this trial by his client. At the time the motion for severance was made, counsel stated only that he believed his client "is probably going to direct me not to make this line of argument." (Tr. 7283). No affidavit was forthcoming from the client.

** Reynold's 3500 material given to counsel strongly suggests that her limited testimony at this trial resulted from a deliberate strategy of the Government and not from her lack of incriminating information about Joseph Sampson. For example, the prosecutor's notes of an interview with Reynolds on July 8, 1976, shows the witness to have stated that Brown cut Joseph Sampson off from the narcotics supply in early 1973 when Lois Sampson moved to New York. (GX 3516B id.). Essentially, Reynolds testified about her own involvement in the conspiracy, testimony that necessarily required her to implicate her sister to some

[Footnote continued on following page]

life, Joseph Sampson was able to use his wife's presence to his own advantage, gaining benefits he would have lost had either he or she been severed.*

The matter was fully developed before the trial judge who heard all the testimony, had all the Jencks Act material given defense counsel and who saw no prejudice to either defendant, either before or during trial. Neither Joseph nor Lois Sampson was protected from joint trial in this case by the marital privilege. No evidence was introduced against either of the Sampsons by the Government or by a defendant to which the privilege even remotely applied. No statements made by one and implicating the other, see *United States v. Figueroa-Paz*, 468 F.2d 1055, 1057 (9th Cir. 1972); *Peek v. United States*, 321 F.2d 934, 942-43 (9th Cir. 1963); *United States v. Thoresen*, 281 F. Supp. 598 (N.D. Calif. 1967), and no testimony concerning confidential communications between the two, see *Hawkins v. United States*, 358 U.S. 74 (1958); *United States v. Fisher*, 518 F.2d 836 (2d Cir. 1975), were offered in evidence. Neither Joseph Sampson nor Lois Sampson testified or offered to testify if severed; see *United States v. Thoresen*, *supra*; *United*

degree. Other information she had concerning her sister and Joseph Sampson, however, was left unsaid to avoid the appearance of family division. (GX 3516B id). Had Ann Reynolds' sister not been on trial, these restraining considerations would not have obtained and the witness would have been free to testify fully.

* At a joint trial, Sampson had the additional advantage of being able to ride on the back of his wife's theory why Ann Reynolds was cooperating in the cases—a theory that would have been otherwise unavailable. Counsel for Lois Sampson skillfully elicited from the witness on cross-examination that during a quarrel between the two sisters concerning money which occurred after the indictment, the witness threatened that if she didn't get money from her sister she would "fix her." (Tr. 4603-04).

States v. Figueroa-Paz, supra. And, courts uniformly have held that the mere joint trial of a husband and wife, when the marital privilege itself is not at issue, is not improper. *United States v. Figueroa-Paz, supra*, 468 F.2d at 1057; *Peek v. United States, supra*, 321 F.2d at 942-43; *United States v. Coleman*, 272 F.2d 108, 110 (2d Cir. 1959); *Cf. United States v. Thoresen*, 281 F. Supp. 598 (N.D. Calif. 1967); *United States v. Schwartz*, 535 F.2d 160 (2d Cir. 1976). Nor is the result changed even when the fact of joint trial has forced upon the spouses the sort of tactical decisions of which counsel complain here, see *United States v. Figueroa-Paz, supra*.

(b) Lois Sampson

Lois Sampson's claim of prejudice requires little discussion. She argues that there was a "spillover" of evidence from her husband and that the jury, unfairly considering them as a "team," was unable to distinguish the evidence as to each. There is no foundation for this claim. The evidence established that the Sampsons were partners in narcotics traffic and the jury was entitled to conclude that they were. Moreover, this jury was clearly able to compartmentalize the evidence as against separate defendants, even spouses: it acquitted Marion Dunmore, the wife of co-defendant Cowpers, even while it convicted him.

For all these reasons, the District Court acted well within its discretion in denying a severance to both Sampsons.

5. There Was No Error in the Court's Conduct of In Camera Discussions With Defense and Government Counsel

By his complaint that at least eleven *ex parte* and sealed discussions were held between trial court and

Government counsel, defendant Bonilla hopes to suggest that acts of prosecutorial misconduct tainted the trial. This claim is totally frivolous.

At least five of the incidents highlighted by Bonilla concerned applications by the Government for rulings pursuant to Title 18, United States Code, Section 3500 (c).^{*} Such applications, by statute, are to be made *in camera* and there can be no error in the court's adherence to that procedure. *United States v. Pacelli*, 491 F.2d 1108, 1118 (2d Cir.), *cert. denied*, 419 U.S. 826 (1974). Two other referenced conferences related to the discharge of a juror; see Point III-1, *supra*. (Tr. 4177-4193, 4300-4303). In view of the sensitive nature of that issue, the fact that more than one defendant appeared possibly involved, the imminent grand jury investigation into possible jury tampering and obstruction of justice, and the overriding need to prevent taint of the remaining juror by their learning of the events which had transpired, the court's actions in holding *in camera* discussions with Government counsel and one defense counsel present and ordering the record sealed were entirely necessary and proper. Since the district judge had authority to discharge the juror *sua sponte*, see Point III-1, defendant Bonilla can in no way claim to have been prejudiced.

The remaining *in camera* conferences equally created no conceivable prejudice to Bonilla. The conference at page 4769 was requested by one of the defense counsel who was present and involved a matter relating only to

^{*} Tr. 1562-63 (which relates to a conference at Tr. 1558); Tr. 2069, 3876 (which relates to Tr. 3600-3606, an *in camera* review of 3500 material that should have been sealed but, by error, was not and was available to counsel); Tr. 5032, 5727.

his client.* The matter at page 5009, at which a defendant, his attorney, his sister, the Government and the trial court were present, while interesting and even humorous, related only to the defendant who was present. The discussion at page 5676 of the record involved the Government's application for a material witness warrant for a witness who had come to New York to testify, but who had fled in fright the day before she was to testify. Finally, the proceedings at page 7991 of the record were conducted solely between the court and one defense counsel, without Government counsel, and related to a question the court had about counsel's just-delivered summation.

6. The Sentences Imposed on Schennault and Cowpers Were Proper.

Both Schennault and Cowpers ask this Court to review their sentences which they argue were excessive. Since neither defendant can point to facts that bring their sentences within the scope of cases such as *McGee v. United States*, 462 F.2d 243 (2d Cir. 1972); *United States v. Robin*, 545 F.2d 775 (2d Cir. 1976); *United States v. Stein*, 544 F.2d 96 (2d Cir. 1976); *United States v. Rosner*, 485 F.2d 1213, 1231 (2d Cir. 1973), *cert. denied*, 417 U.S. 950 (1974), the sentences are not reviewable. *United States v. Tucker*, 404 U.S. 443, 447 (1972); *accord*, *Dorszynski v. United States*, 418 U.S. 424, 441 (1974); *Gore v. United States*, 357 U.S. 386, 397 (1958); *United States v. Wiley*, 519 F.2d 1348,

* The minutes of all but one of the conferences complained of have been transcribed at the Government's request, with the consent of the district judge, and are available for this Court's review. As of this writing the court reporter has been unable to locate the minutes of the § 3500 application at Tr. 5727.

1351 (2d Cir. 1975); *United States v. Tramunti*, 513 F.2d 1087, 1120 (2d Cir.), *cert. denied*, 423 U.S. 832 (1975).*

Cowpers' claim that the trial court improperly relied upon his status as a second felony offender is absurd. The Government filed a second felony offender information prior to trial, pursuant to Title 21, United States Code, Section 851(a), and before imposing sentence the District Court addressed Cowpers personally, see Title 21, United States Code, Section 851(b), who affirmed that he had previously been convicted in 1970 in the United States District Court for the Southern District of New York of violating the federal narcotics laws. Cowpers, who pleaded guilty to the earlier offense, was represented by counsel at that time. (Tr. 9670-71, 9674). His sole present claim is that the district judge should have held a hearing to determine the validity of Cowpers' underlying conviction because of Cowpers' assertion that he was not "properly represented," and that having failed to do so the District Court could not sentence him as a second offender.

Cowpers' unsupported, vague complaint, unaccompanied by a written response to the information, did not mandate a hearing. Since "any challenge to a prior conviction, not raised by response to the information before an increased sentence is imposed in reliance thereon, shall be waived unless good cause be shown for failure to make a timely challenge," Title 21, United

* The District Court's careful enumeration of the factors which influenced its determination of sentence was consistent with this Court's preferred practice. *United States v. Rosner*, Dkt. No. 76-1483, slip op. 1641, 1649 (2d Cir. February 1, 1977); *United States v. Seijo*, 537 F.2d 694, 699 (2d Cir. 1976); *United States v. Velasquez*, 482 F.2d 139, 142 (2d Cir. 1973).

States Code, Section 851(c), the claim here is without merit.*

CONCLUSION

The judgments of conviction should be affirmed.

Respectfully submitted,

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* The court could have sentenced Cowpers to twenty years on the "old law" conspiracy count, and up to fifteen years on the substantive count. The second felony offender information required a minimum sentence of ten years on the conspiracy count and allowed a maximum sentence of forty years on the conspiracy and thirty years on the substantive counts. The twelve-year sentence imposed suggests that even without the filing of the information the District Court would have sentenced Cowpers to the same twelve years. The sentencing judge's reasons are fully set forth on the record. (Tr. 9676-84). Significantly, where Judge Owen imposed a mandatory minimum sentence that he would otherwise not have imposed but for the filing of the second felony information the district judge said so. *See* Sentence of Morris, pages 9664-65.

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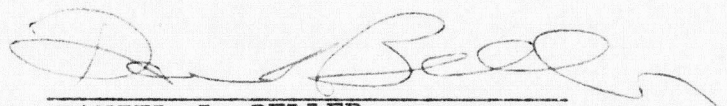
STATE OF NEW YORK)
 : ss.:
COUNTY OF NEW YORK)

DANIEL J. BELLER, being duly sworn,
deposes and says that he is employed in the office
of the United States Attorney for the Southern District
of New York.

That on the 27th day of May, 1977
he served a copy of the within **brief**
by placing the same in a properly postpaid franked
envelope addressed:

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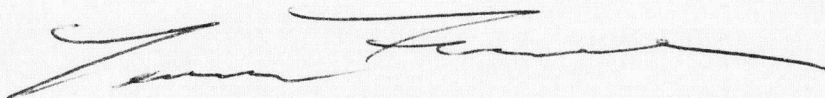
And deponent further says that he sealed the said
envelope and placed the same in the mail chute drop for
mailing at One St. Andrew's Plaza, Borough of Manhattan,
City of New York.



DANIEL J. BELLER

Sworn to before me this

27th day of May, 1977



LAWRENCE FARKASH
Notary Public, State of New York
No. 24-4606580
Qualified in Kings County
Commission Expires March 30, 1979

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